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In The
SUPREME COURT OF THE UNITED STATES

MICHAEL BOULWARE,
Petitioner,
vs.
UNITED STATES OF AMERICA,
Respondent.

On Petition For Writ Of Certiorari To The United States Court of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

(1) Whether, the government is precluded from relitigating the ownership of property in a federal criminal tax prosecution which was the subject of a bona fide adversary state proceeding that, based on the special findings of the jury and findings and conclusions of the judge, resulted in a state civil judgment that determined the property interests among the litigants?

(2) Whether, the cumulative effect of trial error, including the district court's failure to give preclusive effect to the state civil judgment and the district court's restriction of cross-examination of petitioner's alleged co-conspirator, violated the Fifth and Sixth Amendments to the United States Constitution, requiring petitioner's conviction on the conspiracy to make a false statement to a federally-insured financial institution to be reversed?

(3) Whether, the forfeiture of all funds relating to the conspiracy to make a false statement to a federally-insured financial institution, after all the funds loaned were repaid to the financial institution with interest, constitutes an excessive fine in violation of the Eighth Amendment to the United States Constitution?

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OPINIONS BELOW

On September 14, 2004, by an Opinion reported at 384 F.3d 794 (9th Cir. 2004), the United States Court of Appeals for the Ninth Circuit reversed petitioner's convictions for tax evasion and filing false tax returns, affirmed his conviction for conspiracy to make a false statement to a federally-insured financial institution, upheld the related false statement forfeiture order, vacated his sentence, and remanded the case for further proceedings. The Opinion appears in Appendix A to this Petition. On February 1, 2005, the United States Court of Appeals for the Ninth Circuit denied Petitioner's timely petition for panel rehearing, which appears in Appendix B.

BASIS OF JURISDICTION

The United States Court of Appeals for the Ninth Circuit denied, in part, Petitioner's appeal from his conviction, and his petition for panel rehearing on February 1, 2005. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Fifth Amendment, Sixth Amendment, and Eighth Amendment; and 28 U.S.C. §1738; are all set forth in Appendix C.

STATEMENT OF THE CASE AND FACTS

The United States Court of Appeals for the Ninth Circuit, concluded that despite a Hawaii state-court jury and judge determining that the monies and properties at issue were at all

times the properties of Hawaiian Isles Enterprises ("HIE") and were held in constructive trust for HIE by Jin Sook Lee, the state court civil judgment was not binding on the government with respect to the alleged interest of Petitioner Michael Boulware ("Boulware") in the same properties in his federal criminal tax prosecution. The Ninth Circuit did find, however, that the district court's failure to admit the state court judgment with regard to Counts 1-9 was reversible error because "the state-court judgment was crucial to Boulware's defense on the tax counts, and the judgment directly contradicted the government's theory of the case." *United States v. Boulware*, 384 F.3d 794, 808 (9th Cir. 2004).

Rejecting Boulware's contention that Boulware's credibility was prejudiced by the "spill over" from the district court's failure to give preclusive effect to the state court judgment, the Ninth Circuit affirmed the conspiracy to make a false statement to a federally-insured financial institution and ruled that the related forfeiture order was not erroneous despite all the funds having been paid back to the financial institution with interest.

Boulware was initially indicted on four counts of filing false tax returns for the 1989-1992 tax years, in violation of 26 U.S.C. § 7206(1), one count of conspiring to make a false statement to a federally-insured financial institution, in violation of 18 U.S.C. § 371, and four counts of making such false statements, in violation of 18 U.S.C. § 1014. A tenth count sought forfeiture of funds associated with the false statements. A superseding indictment added five new counts of filing false tax returns, for the 1993-1997 tax years, and four counts of tax evasion, in violation of 26 U.S.C. § 7201, for the 1994-1997 tax years. Finally, a second superseding indictment ("the indictment"), amended the factual allegations of the conspiracy count.

After a six-day trial and two-and-a-half days of deliberations, the jury convicted Boulware on November 29, 2001, of all nine tax counts.[1/] The jury also convicted him of conspiring to make false statements to a federally-insured financial institution, but acquitted him of the four substantive false statements counts. The district court sentenced Boulware to a 36-month term of imprisonment on each of the false tax return counts, 51 months on each of the tax evasion counts, and 51 months on the conspiracy count, all terms to run concurrently.[2/]

While working as a telephone repairman, Boulware started M & S Vending in 1979. The company placed video games in bars and restaurants, and quickly expanded into other lines of business, including cigarette sales. In 1985, the company was renamed Hawaiian Isles Enterprises ("HIE"); Boulware owned all of the shares. HIE branched into candy and the office coffee business. Boulware then started roasting and processing coffee beans, and formed a subsidiary named Hawaiian Isles Kona Coffee Company which began wholesaling and retailing coffee. Boulware later formed a bottled water company and, after it became profitable, he transferred its stock to HIE. By 1989, HIE was reporting gross receipts of over $55 million, and by 1992 sales had topped $85 million.

At trial, the government sought to prove that Boulware had diverted funds from HIE in order to support a lavish lifestyle; in particular, that he gave millions of dollars to his

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[1/] During trial, the false tax return counts for the 1994-1997 tax years were severed, redacted from the indictment, and later dismissed with prejudice.

[2/] The court also imposed a three-year term of supervised release, fines, and forfeiture of $495,814.

girlfriend, Jin Sook Lee, and millions of dollars to his wife, Mal Sun Boulware, without reporting this money on his personal income tax returns. According to the government, he siphoned off this money primarily by writing checks to employees and friends and having them return the cash to him, by diverting payments by HIE customers, by submitting fraudulent invoices to HIE, and by laundering HIE money through companies in the Kingdom of Tonga and Hong Kong.

With regard to the false statements counts, the government attempted to prove that Boulware and a business associate named Lorin Kushiyama received financing from General Electric Credit Company ("GECC") based on the submission of false invoices. In particular, the government tried to prove that the financing was purportedly to allow Kushiyama's company to purchase video game machines that it would then lease or sell to HIE. According to the government, HIE already owned the machines and Kushiyama gave the loan proceeds to Boulware.

The defense maintained that Boulware did not under report income in any of the relevant tax years, because HIE maintained beneficial ownership of all of the funds in question. Even if he did under report his income, he at all times acted in good-faith reliance on the advice of counsel.

According to Boulware, he intended to use most of the money at issue in this case to buy out his wife's marital interest in HIE and the money was therefore not, or at least arguably not, taxable to him. He asked his wife for a divorce in 1987, and she threatened to force him to liquidate HIE unless he agreed to give her $5 million and a $1 million house. Boulware and his wife realized that it would take time for HIE to buy out her interest. When he told Jin Sook Lee about the agreement, she asked to hold the money as it was accumulating, because she wanted to make sure he saved it

for the divorce. His lawyer advised him that (1) his wife had a right to half of the company as her marital share of HIE, and (2) if Lee held the funds in trust for HIE, the money would not be taxable to Boulware.

Boulware testified that by 1994 he had collected enough HIE money to redeem his wife's share of the company and finalize their divorce. Lee, however, refused to return the money. For this reason, Boulware had to scramble to obtain other funds to buy out his wife's marital interest. In 1994, Lee filed a complaint against HIE and Boulware in Hawaii state court alleging conversion, breach of contract, and unjust enrichment. Lee alleged that Boulware, individually and as an agent of HIE, had taken cash in the amount of $840,000 from a safe in her home, had wrongfully acquired a parcel of real property belonging to her, and had defaulted on a $1.2 million note. The case proceeded to trial and in 1997, a Hawaii state-court jury and judge found that the money Lee was holding belonged to HIE. The state court ordered Lee to return the money to HIE.

With regard to the GECC loans, the defense made a case that the transactions were not fraudulent. What the government portrayed as false invoices were really legitimate appraisals of the video game machines, which were to serve as collateral for a loan from GECC to HIE.

Boulware argued on appeal that the district court failed to give preclusive effect to and improperly excluded evidence of the Hawaii state-court judgment which, based on the jury's special findings and judge's findings and conclusions, determined that HIE owned the money that Boulware had given to Jin Sook Lee between 1987 and 1994. As the state court found that Boulware had not gifted the funds to Lee and that the funds belonged to HIE, Boulware asserted that he had no federal tax liability for those funds. He argued that the

improper exclusion of this evidence violated his due process right to present evidence in his defense. In addition, he argued he was denied his Sixth Amendment right to cross-examine Kushiyama and that the "spill over" effect of the exclusion of the state court judgment unfairly prejudiced his credibility in the eyes of the jury in violation of his right to due process of law. Finally, he maintained that he should have been given credit on the forfeiture count for all of the funds returned with interest to the financial institution.

On September 14, 2004, the United States Court of Appeals for the Ninth Circuit reversed Boulware's conviction for tax evasion and filing false tax returns, affirmed his conviction for conspiracy to make false statements to a federally-insured financial institution, vacated his sentence on the false statement count and remanded the case for further proceedings consistent with the opinion. App. A p. A-37.

REASONS FOR GRANTING THE WRIT

I. Certiorari Should Be Granted to Determine Whether Property Interests as Determined by a State Civil Judgment Based on the Special Findings of the Jury and Findings and Conclusions of the Judge in a Bona Fide Adversary State Proceeding are Binding Upon the Government in a Federal Criminal Tax Prosecution.

Petitioner Boulware respectfully prays that a Writ of Certiorari issue to determine whether the conclusive effect of a state court judgment determining property rights, following an adversarial, non-collusive state civil jury trial that determined property interests among the parties, precludes the government from relitigating the ownership of the property in a federal criminal tax prosecution. This significant national

question, impacting federal income taxes, federalism, comity and a defendant's right to due process, was left unresolved in *Commissioner v. Bosch,* 387 U.S. 456, 87 S.Ct. 1776, 18 L.Ed.2d 886 (1967)[3/] and the proper application of *Bosch* outside the context of the estate tax statute has engendered confusion in the Circuits. *See, United States v. Boulware*, *supra*, 384 F.3d at p. 804 ("What effect, if any, *Bosch* has outside the context of the estate tax statute is unclear....¶ Supreme Court precedent pre and post-*Bosch* suggest that its holding does not apply outside of the estate-tax context") and *Estate of Warren v. Commissioner*, 981 F.2d 776, 781 (5th Cir. 1993)("The precise scope and meaning of *Bosch* as applied in dissimilar contexts is difficult for us to ascertain").

In Boulware's criminal income tax prosecution, the district court concluded that federal, not state courts, determine an individual's property rights for federal income tax purposes and ruled that an adversarial state court judgment that determined property interests between Boulware and other litigants was not binding on the government at trial. However, unless specifically determined by federal law to be otherwise, the controlling effect of state law property determinations on the administration of federal income tax laws is well settled. "State law creates legal interests and rights. The federal revenue acts designate what interests or rights so created, shall be taxed." *Morgan v.*

[3/] The Court in *Bosch* held that "where the federal estate tax liability turns upon the character of a property interest held and transferred by the decedent under state law, federal authorities are not bound by the determination made of such property interest by a state trial court." *Id.* at 457, 87 S.Ct. 1776; *see also id.* at 465, 87 S.Ct. 1776 ("[W]hen the application of a federal statute is involved, the decision of a state trial court as to an underlying issue of state law should *a fortiori* not be controlling").

Commissioner, 309 U.S. 78, 80 (1939). Federal income tax jurisprudence established the broad general rule that final state court decisions, which determine the economic property rights or interests of parties, in adversarial, non-collusive contests, are binding upon the federal courts.[4/] "This follows from the fact that the federal statute creates no property rights but merely attaches consequences, federally defined, to rights created under state law." *United States v. National Bank of Commerce*, 472 U.S. 713 (1985).

Admittedly the government was not a party to the Hawaii litigation, but this is irrelevant because neither res judicata nor collateral estoppel is usually applicable in a federal income tax prosecution. Whether state property law controls questions of ownership of private property rights and interests in a federal tax case, has repeatedly been resolved in the affirmative. 15 *Mertens Law of Federal Income Taxation* §61.02 (March 2005) summarizes federal taxation law as follows:

> [I]n general, state law creates legal interests and rights, and the federal taxation laws designate what interests or rights, so created, are taxed. That is, the Internal Revenue Code creates no property rights, but merely attaches consequences, federally defined, to rights created under state law. It is state law that generally determines whether a taxpayer has a particular interest in property that would have federal tax consequences, as well as the nature of legal

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[4/] *Freuler v. Helvering*, 291 U.S. 35 (1934); *Blair v. Commissioner*, 300 U.S. 2 (1937); *Mitchell v. United States*, 403 U.S. 190 (1971); *United States v. National Bank of Commerce*, 472 U.S. 713 (1985); *United States v. Brosnan*, 363 U.S. 237 (1960); *Helvering v. Stuart*, 317 U.S. 154 (1942).

> interests and rights created by state law, and the taxpayer's interest in the property. Federal law then determines whether and to what extent these interests will be taxed. In other words, what interest is sufficient to trigger tax liability is governed by federal law, but whether the taxpayer has that requisite interest is governed by state law. [Footnotes omitted.]

However, with respect to the specific issue of the preclusive effect of a state court judgment's determination of property rights, the question is unresolved outside of the estate law context. In *Boucher v. Commissioner*, 710 F.2d 507, 509 (9th Cir. 1983), the Ninth Circuit held that state court determinations of marital property rights are controlling in a federal tax question. "None of the cases cited to us by the taxpayer supports the argument that the tax court or this court may ignore the final determination of a state court, following a contested hearing,... for an interest in property." *Id.* The Hawaii state court judgment (viz., property determination) that HIE owned the funds and that Lee held the funds in constructive trust for HIE was a binding determination on the federal courts, irrespective of collateral estoppel and res judicata. *Boucher*, *supra*, at 512 ("The [state] decree, which is unequivocal and the result of a contested action, is controlling as to the nature of the payments under the applicable tax statutes.")

In *Flitcroft v. Comm'r*, 328 F.2d 449 (9th Cir.1964), the question was whether the retroactive reformation of a trust by a state court could wipe out a federal tax liability for previous years. *Id.* at 453. The Ninth Circuit held that the state court proceeding was not collusive and therefore "the adjudication of the state court is given effect, 'not because it is res judicata against the United States, but because it is conclusive of the

parties' property rights which alone are to be taxed.'" *Id.* at 459.

Nevertheless, in its Opinion in this case, the Ninth Circuit noted that *Freuler v. Helvering*, *Blair v. Commissioner*, and *Flitcroft v. Comm'r*, have been called into question by *Commissioner v. Bosch, supra*, 387 U.S. 456. Finding that with regard to the calculation of estate tax cases, federal courts are not bound by the judgments of state probate courts, the Ninth Circuit in *Boulware* observed:

> What effect, if any, *Bosch* has outside the context of the estate tax statute is unclear....¶ Supreme Court precedent pre and post-*Bosch* suggests that its holding does not apply outside of the estate-tax context. In *Aquilino v. United States,* 363 U.S. 509, 80 S.Ct. 1277, 4 L.Ed.2d 1365 (1960), the Court made the following observation:
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> > It is suggested that the definition of the taxpayer's property interests should be governed by federal law, although supplying the content of this nebulous body of federal law would apparently be left for future decisions. We think that this approach is unsound because it ignores the long-established role that the States have played in creating property interests and places upon the courts the task of attempting to ascertain a taxpayer's property rights under an undefined rule of federal law. It would indeed be anomalous to say that the

> taxpayer's "property and rights to property" included property in which, under the relevant state law, he had no property interest at all.

Id. at 513 n. 3, 80 S.Ct. 1277. More recently, in *United States v. Craft,* 535 U.S. 274, 122 S.Ct. 1414, 152 L.Ed.2d 437 (2002), the Court held that "[s]tate law determines only which sticks are in a person's bundle. Whether those sticks qualify as 'property' for purposes of the federal tax lien statute is a question of federal law." *Id.* at 278-79, 122 S.Ct. 1414; *see also Pahl v. Comm'r,* 150 F.3d 1124, 1128 (9th Cir.1998) (holding that "we look to federal law to determine what interest creates tax liability. We look, however, to state law to determine whether the taxpayer has the requisite interest."). *United States v. Boulware, supra*, 384 F.3d at p. 804.

Although the Ninth Circuit in *Boulware* raised the question regarding *Bosch*'s effect, if any, outside the context of the estate tax statute, the Ninth Circuit left the question unanswered because it erroneously concluded that the state court judgment did not determine whether Boulware had any interest in the contested monies and properties. 384 F.3d at 805. In doing so, the Ninth Circuit overlooked the fact that in the state court action, the parties were Lee, HIE and Boulware, each represented by separate counsel, and that the heart of the controversy was the ownership of the monies and properties at issue. While recognizing that "[t]he state court did find that the money in question belonged to HIE and that Lee had been and was holding it in 'constructive trust' for HIE," the Ninth Circuit concluded that "the ownership of the

money as between Boulware and HIE does not appear to have been subject to adversarial testing." 384 F.3d at 805.

Under Hawaii law, "[c]laim preclusion . . . 'prohibits a party from relitigating a previously adjudicated cause of action.' . . . Moreover, the judgment of a court of competent jurisdiction is a bar to a new action in any court between the same parties or their privies concerning the same subject matter, and precludes the relitigation, not only of the issues which were actually litigated in the first action, but also of all grounds of claim and defense which might have been properly litigated in the first action but were not litigated or decided." *Bremer v. Weeks*, 104 Haw. 43, 53, 85 P.3d 150, 160 (Haw. 2004)(citations omitted).

It is undisputed that the Hawaii state court judgment was the direct result of an adversarial proceeding. The action was initiated by Lee, prior to the indictment in this case. Further, in the Finding of Facts and Conclusions of Law from the state court judgment, conclusion of law No. 3 found there was an agreement between Boulware, HIE, and Lee that at **all times** the funds belonged to HIE, not Boulware.[5/] Moreover, the jury's answer to question 10, set forth by the panel (*Boulware*, *supra*, 384 F.3d at p. 802), shows that the funds belonged to HIE, not Boulware. If the jury determined the funds belonged to Boulware, not HIE, its answer to whether the monies belonged to HIE would have been "no," not "yes." Finally, the jury distinguished between Boulware and HIE with regard to the $1,200,000 promissory note, in Final

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[5/] "There was a **binding agreement between Plaintiff, Boulware and HIE** to hold monies belonging to HIE to pay Mal Sun Boulware for her marital interest in HIE. Pursuant to that agreement, **monies belonging to HIE were entrusted to Plaintiff until such time the monies were needed to pay Mal Sun for her interest in HIE.** (Emphasis added.)

Finding 3.[6/] Supp. ER 7-8, 12-13. Boulware was therefore bound by the state court judgment as a matter of law and could not thereafter assert any property interest in the monies and properties. In other words, contrary to the Ninth Circuit's conclusion, the ownership of the money as between Boulware and HIE was indeed the subject of adversarial testing.

Since Boulware was precluded under Hawaii law from asserting his interest in the properties determined to belong to HIE by the state court judgment, the state court judgment indeed determined Boulware's interest, or lack thereof, in the monies and properties at issue, contrary to the Ninth Circuit's conclusion. The Ninth Circuit, therefore, should have determined that the state court judgment's determination of property interests was binding on the government in Boulware's federal criminal income tax prosecution. This is particularly true, because federal tax law is clear that properties held in constructive trust have continuously been owned by the beneficiary, here HIE, and therefore Boulware could not have owned them. *Jaffhe v. Dunham*, 352 U.S. 280, 281 (1957); *B.I. Financial Services v. Brenine, Inc.*, 854 F. 2d 351 (9th Cir. 1988).

In addition to this Court's precedent of looking to state property law for tax purposes, the United States is also required, by statute, to give the state court judgment "full faith and credit." 28 U.S.C. §1738; *Migra v. Warren City School Dist. Bd. of Education*, 465 U. S. 75, 80 (1984); *Boucher*, *supra* at 512-513 ("Where...the state court has finally determined the character of the challenged payments

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[6/] The totality of the findings in the state court judgment must be viewed together, not in isolation, and when that is done, clearly the jury differentiated between HIE and Boulware on property determinations in the "HCJ".

after a contested hearing, that judgment must be given full faith and credit. *See* 28 U.S.C. § 1738.") 28 U.S.C. §1738 also applies to claims that previously could have been raised, but were not. *Migra, supra*, 465 U.S. at p. 85. Therefore, on remand the government should be precluded from challenging the Hawaiian determination that the funds held by Lee were always in constructive trust for HIE, under 28 U.S.C. §1738.[7/]

In addition, the United States Bankruptcy Court in Hawaii has already honored the state court judgment and the United States (I.R.S.), as a creditor, although having notice of that proceeding, filed no objections (as a creditor or otherwise) to its resolution. The government is therfore precluded from challenging the preclusive effect of the state court judgment. *Siegel v. FHLM Corporation*, 143 F.3d 535, 539 (9th Cir. 1998); and *Williams v. Ocean Transportation Lines, Inc.*, 425 F.2d 1183, 1190 (3rd Cir. 1970).

Finally, this Court has held that it is unconstitutional to tax one person for the income or property of another. In *Hoeper v. Tax Commission of Wisconsin*, 284 U.S. 206, 52 S. Ct. 120 (1931), this Court declared that "because of the fundamental conceptions which underlie our system, any attempt by a state to measure the tax on one person's property or income by reference to the property or income of another is contrary to due process of law as guaranteed by the Fourteenth Amendment. That which is not in fact the taxpayer's income cannot be made such by calling it income." *Id.* at 215, 52 S. Ct. at 122; *Davis v. United States*, 495 U.S. 472, 487, 110 S. Ct. 2014, 2023 (1990)("Unless there is a specific statutory provision to the contrary, a taxpayer

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[7/] It should be noted that *Bosch v. Commissioner, supra*, did not cite or discuss 28 U.S.C. §1738, even though §1738 was enacted in 1948, 19 years before that decision.

ordinarily reports his own income and takes his own deductions").

In this case, by ignoring the property rights established by the state court judgment, the government was permitted to prosecute and convict Boulware for failing to declare as income monies and properties that were determined by the state court judgment to belong to HIE. Under the above-cited cases, the failure to recognize the state court judgment as binding on the issue of HIE's ownership of the monies and properties at issue and to permit the government to attribute ownership of such monies and properties to Boulware for tax purposes deprived Boulware of his Constitutional right to due process.

For all the foregoing reasons, certiorari should be granted to determine whether a bona fide adversarial non-collusive state court judgment determining property rights is conclusive with respect to the litigant's property interests and precludes the government from relitigating this determination in a criminal income tax prosecution.

II. Certiorari Should Be Granted to Determine Whether the Cumulative Effect of Trial Error, Including the District Court's Failure to Give Preclusive Effect to the State Civil Judgment and the District Court's Restriction of Cross-Examination of Petitioner's Alleged Co-Conspirator, Violated the Fifth and Sixth Amendments to the United States Constitution, Requiring the Conspiracy Conviction to Be Reversed.

Boulware was acquitted of the substantive false statement counts, but was convicted of conspiring with Lorin Kushiyama to submit false invoices to GECC to divert monies from HIE to Boulware, for the purpose of avoiding

the reporting of those monies on his tax return, even though Boulware testified there was no such conspiracy and Kushiyama testified he intended to prepare appraisals. Clearly, Boulware's credibility was critical in that determination.

Certiorari should be granted for two reasons. First, this Court should determine whether the district court's failure to give preclusive effect to the state court judgment violated the Fifth Amendment to the United States Constitution because the best corroboration for Boulware's testimony on the conspiracy count, the state court judgment, was not given preclusive effect. This was significant because Count 10 specifically referenced tax Count 4 (Count 10, III (3) (b)), which the panel reversed for failure to admit the state court judgment into evidence. *Boulware*, *supra*, 384 F.3d at p. 814. The state court judgment also refuted the alleged reason for the conspiracy, tax evasion, because the monies, having been determined by the judgment to be the property of HIE, were not taxable as income to Boulware.

Second, Boulware was prevented from cross-examining his alleged co-conspirator on the critical conspiracy issue, whether Kushiyama intended to submit "false invoices." As this inquiry went to the heart of the conspiracy allegation, Kushiyama's intent, this was clear constitutional error.

Given the lack of evidence on this Count, the cumulative effect of the failure to give preclusive effect to the state court judgment and the restriction on cross-examination requires the conspiracy conviction to be reversed.

The State Court Judgment

The Ninth Circuit concluded the refusal to admit the state court judgment with regard to Counts 1-9 was reversible error

because "the state-court judgment was crucial to Boulware's defense on the tax counts, and the judgment directly contradicted the government's theory of the case." *Boulware*, *supra*, at p. 809. The Ninth Circuit recognized the failure to admit the state court judgment adversely affected Boulware's credibility on the Tax Counts[8] (but failed to recognize it was also critical to the verdict on Count 10, as the object of the conspiracy was alleged to be the diversion of funds from HIE, to Boulware, who then failed to report these funds on his tax return [Count 4]). Had the state court judgment been given preclusive effect it would have bolstered Boulware's credibility on Count 10 because it refuted the government's contention that the allegedly "fake invoices" were submitted for the purpose of evading taxes.

During trial, and in closing argument, the government launched an all out improper assault on Boulware's credibility. Even though the government was aware of the state court judgment and, successfully kept the jury from learning of it, the government, nevertheless, made arguments to the jury contrary to the judgment. The government told the jury Lee did not hold funds in trust for HIE (8 RT 33-34,[9] 94-

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[8] "Boulware makes the point...that he was the least effective witness to testify about the [state court] judgment because of his perceived self-interest and bias. In addition, although he called witnesses who testified that HIE at all times owned the funds that he transferred to Lee and that he relied in good faith on the advice of his lawyer and accountants in not reporting the funds on his tax returns, **he points out that the prosecution sharply attacked the credibility of these witnesses, and the judgment would have been key corroborative evidence.**" *Id.*, at pp. 809-810. (Emphasis added.)

[9] "But let's get back to Mal Sun. You know, it would have been so simple for them to establish a trust. Mrs. Boulware and Jin Sook. . . . But the only reason, the only reason this **ridiculous**

95,[10] 97)[11] even though the government knew this to be false. *Cf, United States v. Blueford*, 312 F.3d 962, 968 (9th Cir. 2002)("it is decidedly improper for the government to propound inferences that it knows to be false, or has very strong reason to doubt...."); *United States v. Kojayan*, 8 F.3d 1315, 1323 (9th Cir. 1993). The government falsely argued there was no evidence that Mal Sun Boulware (Boulware's wife) was owed anything because she had no interest in HIE. 8 RT 95;[12] GB 43-44. However, Mal Sun testified she contributed her separate property to HIE during the marriage. 4 RT 197-198. *See, Berger v. United States*, 295 U.S. 78, 88 (1935). Further, under Hawaii law, in the absence of

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story was created is because they couldn't do it legally, because it would have tax consequences. ¶ This man, the defendant, has an army of lawyers, and not one of them ever suggested, according to him, to do it the simple and the right way. **That is incredible.**" (Emphasis added.)

[10] **"Now let's debunk, immediately, this 'trust' argument that you've heard**. This is only one trust in this case. You will have the evidence. The only trust in this case is a trust running to the benefit of the defendant's oldest son; that's it. and the only stock that went into that trust was for the benefit of that son. There was none for Mrs. Boulware. There was nothing for Mrs. Boulware. ¶ . . . . the **biggest red herring in this case is the nonexistent, never, never was, never attempted, trust fund for Mal Sun Boulware. There simply wasn't one.**" (Emphasis added.)

[11] "If anyone lied in this case, it's the defendant. You heard his testimony. ¶ Why was Jin Sook Lee eventually sued by the defendant and his company? Well, we don't really know. Perhaps it was because it made it appear it would help the case. . . ."

[12] "Now, another red herring, *another totally fabricated story* that' the defendant would have you believe, is that Mal Sun Boulware had some kind of a claim against HIE. There is no evidence of that." (Emphasis added.)

extenuating circumstances, properties acquired during marriages with durations of five or more years are equally divided. *See, Tougas v. Tougas*, 76 Haw. 19, 868 P.2d 437 (Haw. 1994). As it was undisputed that Mal Sun had been Boulware's wife for over 10 years, she was obviously entitled to half of HIE's shares. Further, the government improperly elicited Boulware's opinion about the credibility of government witnesses. 6 RT 209-210, 215-216. This was nothing but a blatant attempt to reduce Boulware's credibility in the eyes of the jury, by forcing him to disparage government witnesses the jury would have sympathy for. *See, United States v. Combs*, 379 F.3d 564, 572 (9th Cir. 2004); *United States v. Geston*, 299 F.3d 1130, 1136-1137 (9th Cir. 2002); and *United States v. Sanchez*, 176 F.3d 1214, 1220 (9th Cir. 1999).

The state court judgment was critical to rebut this improper assault on Boulware's credibility by substantiating Boulware's testimony (thereby supporting his credibility) and undermining the prosecution's theory of the case. Simply put, the prejudicial effect of failing to give binding effect to the state court judgment on Counts 1-9, "spilled over" to Count 10, particularly when it is remembered that the jury acquitted Boulware on all counts (Counts 11-14, the substantive false statement counts) that did **not** reference taxes or tax returns.

This Court has long recognized there can be a "spill over" effect from trial error. *Kotteakos v. United States*, 328 U.S. 750, 764 (1946) When the error, here an erroneous impression of Boulware's credibility based upon the failure to introduce significant evidence, has a substantial influence on the outcome, or if one is left with grave doubt regarding the outcome, the conviction cannot stand. *Kotteakos v. United States*, *supra*, 328 U.S. at p. 765. This is particularly

critical here where the alleged co-conspirator, Kushiyama, never testified he intended to do anything to mislead GECC, and, in fact, testified he intended to verify the collateral for the GECC financing agreements. It is also critical because Boulware testified he did not intend to deceive anyone. The excluded state court judgment provided many reasons for believing Boulware and many reasons for disbelieving the arguments by the government.

In *United States v. Keating*, 147 F.3d 895 (9th Cir. 1998), jurors, during deliberations, discussed the fact that Keating was previously convicted in state court, even though this information had not been disclosed during trial. The district court granted at new trial, which the Ninth Circuit affirmed. *United States v. Keating*, *supra*, 147 F.3d at pp. 904-905. Significantly, the court concluded the prejudice spilled over to his son, Keating III, requiring a new trial for him, also. *Id.*, 147 F.3d at p. 905.

Where the "spill over" is between counts, not defendants, the effect of the error is the same. *Cf. United States v. Bordallo*, 857 F.2d 519, 528 (9th Cir. 1988). Counts 1-9 involved false statements on tax returns and underpayment of taxes. Count 10 referenced taxes and Count 4 in particular, which the state court judgment specifically refuted. The critical determination on Count 10, as it was on Counts 1-9, was Boulware's credibility. Because the state court judgment was not given preclusive effect, the government was able to undermine Boulware's credibility on Counts 1-10, and he was not able to refute the government's "improper" arguments, with critical, relevant and compelling evidence.

As the evidence against Boulware was, at best, extremely weak, this prejudicial "spill over" from the failure to give preclusive effect to the state court judgment sufficiently

undermines the reliability of the verdict to require the conspiracy conviction to be reversed.

Unconstitutionally Restricted Cross-examination

The government was required to prove Boulware had an agreement with Kushiyama to submit false documentation to GECC. *United States v. Shabani*, 513 U.S. 10, 16, 115 S.Ct. 382 (1994). Consequently, Kushiyama's specific intent to submit false invoices was the critical element of the offense. However, Kushiyama testified he provided appraisals for Boulware, verifying there was sufficient collateral listed in each appraisal (invoice) to cover the amount of money financed by GECC. When defense counsel attempted to question Kushiyama about whether he intended to submit false invoices to GECC, the trial court refused to permit this questioning.[13] 3 RT 59. This inquiry was critical because Boulware could not be guilty of conspiring with Kushiyama, unless Kushiyama intended to deceive.

The Ninth Circuit incorrectly analyzed the failure to allow this critical cross-examination of Kushiyama. *Boulware*, *supra*, at 812. Although the Ninth Circuit correctly observed that Kushiyama had been asked about preparing invoices or appraisals for other individuals, and objections had generally been sustained to these questions, that observation was irrelevant to the question posed to Kushiyama, challenged here, referring to "**these invoices.**" During direct examination the prosecution marked, and admitted into

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[13] "Q. As far as **these invoices**, you are not the -- intending to submit fake invoices to anyone, were you?

Mr. Osborne: Objection, your Honor.

The Court: Sustained. The objection is sustained."

evidence, packages of invoices as Exhibits 36 and 45. 3 RT 37, 47-48. When counsel for Boulware started cross-examining Kushiyama, he referred to these Exhibits, the alleged false invoices, as "these invoices." 3 RT 54,[14] 55,[15] 56,[16] and 58.[17] While defense counsel did at times ask about appraisals prepared for other people, it was clear that his reference to **"these invoices"** referred to the invoices marked and admitted into evidence (Exhibits 36 and 45), and the question asked about submitting fake invoices referred to those Exhibits. Therefore, the question was highly relevant

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[14] "Q. We're talking about **these invoices** that you had prepared which had these equipment on it and place a valued on it. . . ."

[15] "Q. Before you prepared **these invoices** for HIE, ..."

[16] "Q. As far as the purpose of **these invoices**, your understanding was that there was a need for collateral for financing with GECC; am I correct"

A. Yes, sir.

* * *

Q. So your purpose of using **these invoices** was to provide value to the particular equipment; am I correct?

A. Yes, sir.

* * *

Q. And you said that you were looking at the inventory, and the inventory that was provided to you had a list of these [sic] equipment, some of which you had put down on **these invoices**; correct?

A. Yes.

* * *

Q. And these are the machines that you have identified on **these invoices** which have been submitted as exhibits here; am I correct?

A. Yes, sir."

[17] "Q. And, as far as **these invoices**, they reflect that--you are giving an appraisal of these [sic] equipment; am I correct?

A. Yes, sir."

and obviously permissible. The failure to allow this question unconstitutionally prevented Boulware from questioning Kushiyama, the critical prosecution witness, about the very heart of the charge, Kushiyama's intent or lack thereof to make a false statement. The prohibited cross-examination has traditionally been **required** by this Court. *See, Davis v. Alaska*, 415 U.S. 308, 315, 317-18 (1974); *Chambers v. Mississippi*, 410 U.S. 284, 295 (1973); *see also, Delware v. Van Arsdall*, 465 U.S. 673, 680 (1986)). This inquiry was particularly significant because the expected answer to the question,[18] "no," if believed by the jury, required the jury to acquit Boulware on Count 10. As explained below, this failure to allow cross examination violated Boulware's Sixth Amendment rights and requires the conviction on Count 10 to be reversed because this constitutional error was clearly not "harmless beyond a reasonable doubt," nor can it be justified by any previous opinion by this Court.

Remarkably, the Ninth Circuit mistakenly concluded the error was not so severe as to amount to a violation of Boulware's Sixth Amendment rights because the Ninth Circuit concluded that the district court was under the impression that the question about "these invoices" referred to invoices prepared for other individuals. *Boulware, supra*, 384 F.3d at p. 812. As explained above, this could not be the case. However, even if the district court understood the question to refer to using the same form, labeled "invoice," for appraisals for other individuals, this question was also highly relevant and was required to be allowed. First, if this

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[18] From the answers to the previous questions, it reasonably appeared that Kushiyama would have answered the question "no," Kushiyama was not intending to submit "fake invoices." The jury was precluded from hearing that testimony, to Boulware's substantial prejudice.

was the "form" Kushiyama used for all his appraisals, this allowed the inference (and argument to the jury) that Kushiyama was truthful in his testimony that he intended to perform appraisals for Boulware with these "invoices." If, on the other hand, Kushiyama had not previously used this form labeled "invoice" to perform appraisals, this allowed a contrary inference. Clearly, questions about appraisals for others were highly relevant, were not time consuming, and were required to be allowed.

The specific question here, whether Kushiyama used this form labeled "invoice" to submit "fake" appraisals or "invoices" for other individuals [as the Ninth Circuit suggests the district court understood the question], was also highly relevant. *See, Boulware, supra*, at 805, discussing relevant evidence. If Kushiyama intentionally submitted fake documents for others, this would support the inference he intended to do so with the invoices admitted into evidence. However, if he never submitted "fake" invoices or appraisals for others, this was circumstantial evidence that he did not intend to do so here. Clearly, Boulware was also entitled to cross examine Kushiyama on this subject. See cases previously cited. Therefore, the failure to allow this cross-examination, whether or not the district court correctly understood the question, denied Boulware his right to cross examine Kushiyama, because under either interpretation of the question the cross-examination was highly relevant and critical to the charge and to Boulware's defense.

Because the district court had a pattern of rulings that denied Boulware his right to cross examine Kushiyama, the critical witness regarding the conspiracy, it is no wonder that counsel did not rephrase the "fake invoice" question, as suggested by the panel. *Boulware, supra*, 384 F.3d at p. 812. The Ninth Circuit's additional reference to calling Kushiyama

as a defense witness is puzzling. When the district court did not allow critical and relevant questions on cross-examination, where there is supposed to be wide latitude, it is certainly unlikely that similar questions would be allowed on direct examination of the same witness. Rewording the question would not have accomplished anything, because even under the Ninth Circuit's strained interpretation that the question referred to intending to fake invoices for others, it was required to have been allowed under the Sixth Amendment. Therefore, this restriction of cross-examination clearly violated the Sixth Amendment and, as will be explained, could not constitute "harmless error."

Count 10 charged a conspiracy between Boulware and Kushiyama. To convict, the jury had to find that Kushiyama was aware that Boulware had a plan to submit false statements to GECC to influence decisions of GECC and that Kushiyama participated in that plan, preparing "fake invoices" to influence decisions of GECC. For Boulware to be guilty, Kushiyama had to be guilty, as he was the only possible co-conspirator. This is because a conspiracy is defined as an agreement between two or more people to commit an unlawful act, *United States v. Shabani*, *supra*, 513 U.S. at p. 16; the "agreement" requires a "meeting of minds." "In a conspiracy, two different types of intent are generally required – the basic intent to agree, which is necessary to establish the existence of the conspiracy, and the more traditional intent to effectuate the object of the conspiracy." *United States v. United States Gypsum Co.*, 438 U.S. 422, 443, fn. 20, 98 S.Ct. 2864 (1978).

Therefore, there had to be sufficient evidence that Kushiyama prepared "fake invoices" intending to influence the action of GECC regarding leases with HIE. Significantly, the government never asked Kushiyama, if he prepared fake

invoices. Kushiyama testified he was asked by Boulware to make of list of HIE equipment to be financed (refinance) through GECC, and he did so.[19] 3 RT 37, 56-57, 63-64. While this list was used by Boulware for refinancing used equipment owned by HIE, Kushiyama's never explicitly testified he conspired to, or did, submit a false statement to GECC; in fact, his testimony implied just the opposite. Further, there was no testimony that Kushiyama spoke with anyone from GECC.

If GECC was misled by the paperwork submitted by Boulware, this had to be intended by Kushiyama for there to be a conspiracy. Had Kushiyama intended this, it would have been simple for the government to establish this by merely asking him. Even if Boulware intended to deceive GECC,[20] which he did not (6 RT 163), that intent, alone, was insufficient to prove a conspiracy, which, as previous stated, takes the joined intent (by agreement) of at least two people. *Cf. United States v. Ritter*, 989 F.2d 318,321 (9th Cir. 1993),

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[19] The government never contended Kushiyama's testimony was untrue; nor did it offer proof that the listed machines did not exist or that the value listed for each machine was not accurate; nor did it offer other evidence regarding "fake invoices."

[20] The representatives of GECC admitted that GECC financed new and used equipment. 3 RT 4, 14; 5 RT 186-187. The Indictment alleged that the Master Lease Agreement only required the equipment to be received "in good condition and repair." Count 10, III (3)(A). There was no testimony about any repair or condition problems with the equipment listed in the leases. This supports Boulware's testimony, and it refutes the government's theory in its Opening Statement (1 RT 108), that the lease involved non existent equipment.

reversing convictions for conspiracy to commit murder for hire.[21/]

Here, Kushiyama testified he was providing values for used equipment to serve as collateral for loans to HIE. There was no testimony he spoke to any representative of GECC, or that he was told about Boulware's conversations with said representatives. There was no testimony he intended his "appraisal" to be viewed as a "sale" to HIE. Therefore, for the jury to have convicted, it had to infer said happenings. However, the sought after, but prohibited, cross examination, refuted those necessary inferences by the jury. Clearly, under these circumstances, where the prohibited questioning went to the heart of the defense, and the heart of the charged offense, the restriction on cross examination violated the Sixth Amendment and the error was not "harmless beyond a reasonable doubt."

When the above errors (prejudicial spill over from the district court's failure to give binding effect to the state court judgment and unconstitutional restriction on cross-examination) are considered cumulatively, *Kyles v. Whitely*, 514 U.S. 419, 421-422 (1995), it is clear that the conviction on Count 10 must be reversed, because it is unlikely the jury

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[21/] **"Ritter did not know that anyone would be paid to commit murder**. He was not a party to any of the conversations between Bliss and Runevich that pertained to exchanging M-16s for Haynie's murder. **Nothing in the record suggests that he knew about those conversations.** The evidence is therefore insufficient to find that Ritter made an agreement or had the requisite intent to violate Section 1958. **Because he did not agree or intend to commit the underlying offense, Ritter is not guilty of conspiracy**. (Emphasis added.) ¶ **Neither is Bliss**, because his only coconspirator were government agents. See *United States v. Escobar De Bright*, 742 F.2d 1196, 1199 - 1200 (9th Cir. 1984). . . ." (Emphasis added.)

would have convicted without said errors. This is especially true when the closeness of the evidence is considered. When the conviction for Count 10 is reversed, this requires the forfeiture in Count 15 to be vacated, because there is no longer a predicate conviction for the forfeiture.

III. The Forfeiture of All Funds Relating to the Conspiracy, after All the Funds Loaned Were Repaid to the Financial Institution with Interest, Constitutes an Excessive Fine in Violation of the Eighth Amendment to the United States Constitution.

Count 10 charged Boulware with conspiring to make a false statement to GECC to obtain money based on the alleged presentation of false invoices for the purchase of equipment to be leased. Boulware was acquitted on Counts 11, 12, 13 and 14, charging the substantive offenses relating to the alleged false invoices. Count 15 sought forfeiture of $495,814.80, the amount of money involved in the allegations regarding GECC, even though that sum, with interest, had long since been repaid.

In *United States v. Bajakajian*, 524 U.S. 321 (1998), this Court held that the Eighth Amendment's prohibition against excessive fines could render a criminal forfeiture constitutionally excessive. In *Austin v. United States*, 509 U.S. 602 (1993), this Court held that a civil forfeiture action was subject to the Excessive Fines Clause as well. In *Bajakajian*, this Court adopted a proportionality approach to an *in personam* criminal forfeiture action. *United States v. Bajakajian*, *supra*, 524 U.S. at pp. 334-335. This Court held that a forfeiture violates the Excessive Fines Clause if it is "grossly disproportional to the gravity of the defendant's offense." This Court looked to the following in evaluating

proportionality: (1) whether the offense is related to other illegal activities; (2) the potential penalties for the offense; and (3) the harm caused by the offense. *Id.* at 336-40; *see also, United States v. 3814 NW Thurman Street*, 164 F.3d 1191 (9th Cir. 1999) (forfeiture of funds where neither creditors nor the government suffered any actual loss was excessive fine). The Eighth Circuit has held that a defendant is entitled to an offset for repaid funds under 18 U.S.C. §982 (a)(1), which applies to different offenses but is very similar to §982(a)(2), involved here. *United States v. Hawkey*, 148 F.3d 920, 928 (8th Cir. 1998).

The forfeiture of almost $500,000.00 is totally disproportional to the offense, particularly given that there was no loss and therefore no harm to the victim, the amount financed was completely collateralized, and the funds advanced have already been repaid to the alleged victim of the fraud who will not receive the forfeited funds from the government as there is nothing to repay. Further, the funds are not related to any other illegal activity as they were determined in the state court judgment to have been held in trust for HIE. Moreover, Boulware may serve a sentence of imprisonment (presently set at 51 months) for committing the offense. The additional punishment of almost $500,000.00 under these circumstances is unduly harsh and excessive in violation of the Eighth Amendment.

CONCLUSION

For the reasons set forth above, a Writ of Certiorari should issue to review the decision of the United States Court of Appeals for the Ninth Circuit. This Petition for Writ of Certiorari presents important questions impacting federal income tax, federalism, comity, a criminal defendant's rights

to due process, a fair trial and his right to present a defense and to cross-examine witnesses, under the Fifth and Sixth Amendments to the Constitution, and the prohibition against excessive fines under the Eighth Amendment to the Constitution. Certiorari should be granted to resolve these important questions.

Dated: May 2, 2005

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

No. 02-10287

UNITED STATES OF AMERICA, Plaintiff-Appellee,

vs.

MICHAEL H. BOULWARE, Defendant-Appellant.

D.C. No. CR 99-0239 ER.

Appeal from the United States District Court
for the District of Hawaii
Edward Rafeedie, District Judge, Presiding

Argued and Submitted Dec. 1, 2003.
Filed Sept. 14, 2004.

Reported at: 384 F.3d 794

Before TASHIMA, THOMAS, and SILVERMAN, Circuit Judges.

Opinion by Judge TASHIMA; Dissent by Judge SILVERMAN.

TASHIMA, Circuit Judge.

Michael H. Boulware appeals from his conviction, after trial by jury, on five counts of filing false tax returns, four counts of tax evasion, and one count of conspiracy to make false statements to a federally-insured financial institution. He contends that all of his convictions must be reversed because the government failed to meet its burden of proof on the tax counts, constructively amended the indictment during trial, and engaged in prosecutorial misconduct. He also contends that the district court prejudicially erred in excluding key evidence and giving inadequate and misleading jury instructions. Finally, he contends that his sentence must be vacated, because the district court failed to resolve factual disputes regarding the amount of the tax loss. In its cross-appeal, the government contends that the district court erred by refusing to enhance Boulware's sentence for obstruction of justice.

Although most of the errors alleged by Boulware do not warrant reversal of his convictions, one of them does. The district court abused its discretion by excluding evidence of a state-court judgment that directly supported Boulware's defense to the tax charges and that directly contradicted the government's theory of the case--that Boulware had stolen money from his closely-held corporation and gifted it to his girlfriend. As the error went to the heart of Boulware's defense and was ***799** not harmless beyond a reasonable doubt, Boulware is entitled to a new trial on the nine tax counts.

I

After a six-year investigation by the Internal Revenue Service ("IRS"), Boulware was indicted on four counts of filing false tax returns for the 1989- 1992 tax years, in

violation of 26 U.S.C. § 7206(1), one count of conspiring to make a false statement to a federally-insured financial institution, in violation of 18 U.S.C. § 371, and four counts of making such false statements, in violation of 18 U.S.C. § 1014. A tenth count sought forfeiture of funds associated with the false statements. A superseding indictment added five new counts of filing false tax returns, for the 1993-1997 tax years. and four counts of tax evasion, in violation of 26 U.S.C. § 7201, for the 1994-1997 tax years. Finally, a second superseding indictment ("the indictment"), amended the factual allegations of the conspiracy count.

After a six-day trial and two-and-a-half days of deliberations, the jury convicted Boulware on November 29, 2001, of all nine tax counts. [FN1] The jury also convicted him of conspiring to make false statements to a federally-insured financial institution, but acquitted him of the substantive false statements counts. The district court sentenced Boulware to a 36-month term of imprisonment on each of the false tax return counts, 51 months on each of the tax evasion counts, and 51 months on the conspiracy count, all terms to run concurrently. [FN2]

FN1. During trial, the false tax return counts for the 1994-1997 tax years were severed, redacted from the indictment, and later dismissed with prejudice.

FN2. The court also imposed a three-year term of supervised release, fines, and forfeiture of $495,814.

II

Boulware started M & S Vending in 1979, while working as a telephone repairman. The company placed video games

in bars and restaurants, and it quickly expanded into other lines of business, such as cigarette sales. In about 1985, the company was renamed Hawaiian Isles Enterprises ("HIE"); Boulware owned all of the shares. HIE branched out into coffee roasting and sales, and formed a subsidiary named Hawaiian Isles Kona Coffee Company. Boulware later acquired a bottled water company and transferred its stock to HIE. By 1989, HIE was reporting gross receipts of over $55 million, and by 1992 sales had topped $85 million.

At trial, the government sought to prove that Boulware had systematically diverted funds from HIE in order to support a lavish lifestyle. In particular, that he gave millions of dollars of HIE money to his girlfriend, Jin Sook Lee, and millions of dollars to his wife, Mal Sun Boulware, without reporting any of this money on his personal income tax returns. According to the government, he siphoned off this money primarily by writing checks to employees and friends and having them return the cash to him, by diverting payments by HIE customers, by submitting fraudulent invoices to HIE, and by laundering HIE money through companies in the Kingdom of Tonga and Hong Kong.

With regard to the false statements counts, the government attempted to prove that Boulware and a business associate named Lorin Kushiyama received financing from General Electric Credit Company ("GECC") based on the submission of false invoices. In particular, the government ***800** tried to prove that the financing was purportedly to allow Kushiyama's company to purchase video game machines that it would then lease or sell to HIE. According to the government, HIE already owned the machines and Kushiyama gave the loan proceeds to Boulware.

The defense case was that Boulware did not underreport income in any of the relevant tax years, because HIE maintained beneficial ownership of all of the funds in question. Even if he did underreport his income, he at all times acted in good-faith reliance on the advice of counsel.

According to Boulware, he intended to use most of the money at issue in this case to buy out his wife's marital interest in HIE and the money was therefore not, or at least arguably not, taxable to him. He asked his wife for a divorce in 1987, and she threatened to force him to liquidate HIE unless he agreed to give her $5 million and a $1 million house. Boulware and his wife realized that it would take time for HIE to buy out her interest. When he told Jin Sook Lee about the agreement, she asked to hold the money as it was accumulating, because she wanted to make sure he saved it for the divorce. His lawyer advised him that (1) his wife had a right to half of the company as her marital share of HIE, and (2) if Lee held the funds in trust for HIE, the money would not be taxable to Boulware.

Boulware testified that by 1994 he had collected enough HIE money to redeem his wife's share of the company and finalize their divorce. Lee, however, refused to return the money. For this reason, Boulware had to scramble to obtain other funds to buy out his wife's marital interest. For example, he received a $1.7 million loan from Harold Okimoto. Finally in 1997, a Hawaii state-court jury found that the money Lee was holding belonged to HIE. The state court ordered Lee to return the money to HIE.

The defense also tried to show that, despite Boulware's success as an entrepreneur, he was a relatively unsophisticated person who neither understood nor paid

attention to accounting issues. A certain disregard of corporate formalities was also due to the fact that he owned and ran the company. In addition, the nature of his business (*e.g.*, purchasing coffee beans in cash from growers on Kona) required that he receive corporate advances to make deals. He always informed his comptroller Merwyn Manago of these transactions, and they were (or Boulware was under the impression that they were) reported on HIE's books and tax returns.

With regard to the GECC loans, the defense made a case that the transactions were not fraudulent. What the government portrayed as false invoices were really legitimate appraisals of the video game machines, which were to serve as collateral for a loan from GECC to HIE.

III

A. Exclusion of the State-Court Judgment

Boulware argues that the district court improperly excluded evidence of a Hawaii civil judgment, which determined that HIE owned the money that Boulware had given to Jin Sook Lee between 1987 and 1994. As the state court found that Boulware had not gifted the funds to Lee and that the funds belonged to HIE, he contends that he had no federal tax liability for those funds. He argues that the improper exclusion of this evidence violated his due process right to present evidence in his defense.

1. Standard of Review

We generally review a district court's evidentiary rulings for abuse of ***801** discretion. *United States v. Sua,* 307 F.3d

1150, 1152 (9th Cir.2002), *cert. denied,* 537 U.S. 1221, 123 S.Ct. 1327, 154 L.Ed.2d 1078 (2003). Under this standard, reversal is appropriate only where the trial court made an error of law or a clearly erroneous finding of fact, or where the reviewing court has " 'a definite and firm conviction that the district court committed a clear error of judgment.' " *United States v. Finley,* 301 F.3d 1000, 1007 (9th Cir.2002) (quoting *United States v. Benavidez-Benavidez,* 217 F.3d 720, 723 (9th Cir.2000)). We review de novo the district court's interpretations of the Federal Rules of Evidence. *United States v. Angwin,* 271 F.3d 786, 798 (9th Cir.2001).

2. Factual Background

On October 7, 1994, over a year after Boulware became aware that the IRS was investigating him, but four-and-a-half years before he was indicted, Jin Sook Lee filed a complaint for conversion, breach of contract, and unjust enrichment against Boulware and HIE in Hawaii state court. In the complaint, Lee alleged that Boulware, individually and as an agent of HIE, had taken $840,000 in cash from a safe in her home, had wrongfully acquired a real property belonging to her, and had defaulted on a $1.2 million note. She sought compensatory and punitive damages.

On November 17, 1994, Boulware and HIE answered Lee's complaint and denied all the relevant allegations. Boulware and HIE also filed a counterclaim against Lee for breach of contract, breach of fiduciary duty, unjust enrichment, constructive trust, conversion, quiet title, accounting, declaratory relief, cancellation of instruments, and compensatory and punitive damages.

In Boulware and HIE's counterclaim, they alleged the following facts regarding the payments to Lee:

> 5. In 1987, Boulware was married to Mal Sun Boulware. At that time, due to irreconcilable differences, Michael Boulware and Mal Sun Boulware agreed that they would get divorced because their marriage was beyond redemption. Boulware understood and realized that division of the marital property would require substantial sums of cash and properties in order to satisfy his wife's demands. Boulware wanted to insure that he would not have to sell [HIE] as a result of the divorce. Boulware advised Lee that he and his wife had decided to divorce and advised her of the parties' property division discussions and agreements and that such agreements would require the payment of substantial sums in cash and properties....
>
> 6. Commencing in or about 1987[HIE] advanced monies from time to time to Boulware pursuant to oral and written understandings and debt instruments whereby Boulware agreed to account for and repay all such monies not properly accounted for as business expenditures incurred on behalf of the company. Commencing in or about 1987 and continuing through approximately 1993, Boulware transferred directly to Lee, or caused [HIE] to deliver to Lee, certain monies pursuant to the oral and written understandings referenced above. At all times, Lee understood and agreed that all such funds not used by Boulware and Lee for purposes of advancing the business interests of [HIE], had to be repaid in full to Boulware and [HIE]. Lee further understood and agreed that a

portion of the funds paid back by her would be used to satisfy the property settlement agreements between Boulware and his then wife Mal Sun Boulware.

* * *

22. At all times relevant herein, a confidential relationship existed between ***802** Lee and Counterclaimaints. Based upon and arising out of said confidential relationship, Counterclaimants transferred to Lee monies and properties valued in excess of $5 million. Lee promised to hold said assets for the benefit of[HIE] and to prevent their dissipation and to reconvey them to Counterclaimants upon demand....

Boulware and HIE sought a declaration that the transfers to Lee were not gifts.

After a trial on the merits, the jury found that the monies were not gifts and that the monies belonged to HIE. The relevant question on the special verdict form read, as follows:

Question No. 10. Jin Sook Lee claims the cash and checks delivered to her, during the period from March, 1987 to May, 1994, by Michael Boulware and Hawaiian Isles Enterprises were gifts. Michael Boulware and Hawaiian Isles Enterprises claim the monies were not gifts but were to be held by Jin Sook Lee and to be returned when requested. State your findings below:

The monies were gifts to Jin Sook Lee Yes ____ No ✓

The monies belong
to Hawaiian
Isle Enterprises Yes ✓ No _____

Likewise, in deciding the equitable issues of unjust enrichment and constructive trust, the state court judge found by clear and convincing evidence that the monies were not gifts to Lee. The judgment provides in relevant part:

> As to Counts I, III, IV and V, judgment in favor of Defendant/Counterclaimant HAWAIIAN ISLES ENTERPRISES, INC. and against Plaintiff [Lee] in the amount of $4,551,931.00, said amount being the property of Defendant/Counterclaimant HAWAIIAN ISLES ENTERPRISES, INC. which has been and is being held in constructive trust by Plaintiff and by which Plaintiff has been and is being unjustly enriched[.]

In this case, Boulware moved to adopt as controlling the state court's determination that the money belonged at all times to HIE and was therefore not taxable to him. The district court denied the motion on the ground that the jury only determined ownership of the money as between Lee and HIE, and was not asked to determine ownership as between HIE and Boulware.

Boulware then filed a motion in limine to preclude the government from referring to the monies transferred to Lee as gifts, a factual issue that had been subject to adversarial testing in the state court, or alternatively to allow the introduction of the state court judgment to rebut the government's gift theory. The government in turn filed a motion in limine to exclude introduction of the state court

judgment on four grounds: (1) the judgment had no preclusive effect, because the United States was not a party to the state action; (2) the state court judgment was not relevant, because it determined ownership of the moneys only as between Lee and HIE and so was not inconsistent with the theory that the money was reportable income to Boulware; (3) the judgment was unreliable, and admitting the judgment would confuse the jury and would lead to a mini-trial to show the deficiencies in the evidence considered in the state case; and (4) the judgment was inadmissible hearsay.

In Boulware's opposition to the government's motion in limine, he argued that collateral estoppel is not the issue. Rather, as a determination of property rights, the state court judgment has preclusive effect for purposes of determining whether he had a federal tax liability. In addition, the state court judgment was relevant to the issue of whether he gifted money to ***803** Lee and thereby diverted HIE money for personal purposes. The judgement would also allow him to argue that his failure to amend his tax returns was in good-faith reliance on the state court judgment. He further argued that the district court did not have jurisdiction to question the reliability of the state court judgment absent a showing of collusion. Finally, Boulware argued that the judgment was admissible as a record of property rights under Federal Rule of Evidence 803(14), and that its probative value far outweighed any danger of unfair prejudice, confusion of the issues, or waste of time.

The district court granted both motions, explaining that "the characterization of this transfer as a gift is not relevant to the ultimate issues of the case" and that the jury should decide the case based on the testimony of the witnesses. The court ruled that no witnesses should discuss the state court

judgment, but that he would leave the matter open to reconsideration.

At trial, the government at times suggested to the jury that Boulware gave the money to Lee as a gift, arguing, for example, that Boulware spent the money "to support a lifestyle of a Porsche, a Blazer, a Mercedes; enough of a lifestyle to support an estate in Kahala; support both a wife and a girlfriend, both of whom received millions of dollars...." At other times, however, the government argued that Boulware gave the money to Lee to hide it from the IRS, to hide it from his wife, or to use HIE money to pay off his own obligation to his ex-wife, arguing, for example, that Boulware took the money so that he "could dump his wife without paying a dime." The court sustained the government's objections to questions about the judgment. Boulware himself testified without objection, however, that he ended up in a lawsuit with Lee to force her to return the money, and that she was forced to return $5 million or $6 million to HIE.

3. Analysis

a. *Does the State Judgment Have Preclusive Effect?*

Boulware argues that the state court judgment precluded the government from relitigating the ownership of the funds he delivered to Lee. He bases his argument not on the affirmative defense of collateral estoppel, because the government was not a party to the state lawsuit, but rather on the principle that state law determines the property rights to which federal law attaches tax consequences. Because the state court jury found that Boulware had not gifted the funds

to Lee and that the funds belonged to HIE, he argues that he had no federal tax liability for those funds. We disagree.

Boulware relies on cases such as *Freuler v. Helvering,* 291 U.S. 35, 54 S.Ct. 308, 78 L.Ed. 634 (1934), *Blair v. Comm'r,* 300 U.S. 5, 57 S.Ct. 330, 81 L.Ed. 465 (1937), and *Flitcroft v. Comm'r,* 328 F.2d 449 (9th Cir.1964). These tax cases stand for the proposition that federal courts must treat as binding state court determinations on questions of state law as long as the judgments were not obtained through collusion. In *Flitcroft,* for example, the question was whether the retroactive reformation of a trust by a state court could wipe out a federal tax liability for previous years. *Id.* at 453. We held that the state court proceeding was not collusive and therefore "the adjudication of the state court is given effect, 'not because it is res judicata against the United States, but because it is conclusive of the parties' property rights which alone are to be taxed.' " *Id.* at 459 (quoting *Gallagher v. Smith,* 223 F.2d 218 (3d Cir.1955)).

These authorities, however, have somewhat been called into question by the Supreme ***804** Court's 1967 decision in *Commissioner v. Bosch,* 387 U.S. 456, 87 S.Ct. 1776, 18 L.Ed.2d 886 (1967). There, the Court held that "where the federal estate tax liability turns upon the character of a property interest held and transferred by the decedent under state law, federal authorities are not bound by the determination made of such property interest by a state trial court." *Id.* at 457, 87 S.Ct. 1776; *see also id.* at 465, 87 S.Ct. 1776 ("[W]hen the application of a federal statute is involved, the decision of a state trial court as to an underlying issue of state law should *a fortiori* not be controlling"). *Bosch* is distinguishable, however, because it dealt with the federal estate tax statute, and the Court appeared to give great weight

to a statement in the legislative history that " 'proper regard,' not finality, 'should be given to interpretations of the will' by state courts and then only when entered by a court 'in a bona fide adversary proceeding.' " *Id.* at 463-64, 87 S.Ct. 1776.

It is clear, therefore, that with regard to the calculation of estate taxes, federal courts are not bound by the judgments of a state probate court. *See, e.g., Estate of Rapp v. Comm'r,* 140 F.3d 1211, 1215-16 (9th Cir.1998). What effect, if any, *Bosch* has outside the context of the estate tax statute is unclear. The Fifth Circuit has held that "[t]he relevance of a state court's judgment to the resolution of a federal tax question will vary, depending on the particular tax statute involved as well as the nature of the state proceeding that produced the judgment." *Estate of Warren v. Comm'r,* 981 F.2d 776, 781 (5th Cir.1993) (quoting *Brown v. United States,* 890 F.2d 1329, 1342 (5th Cir.1989)).

Supreme Court precedent pre and post-*Bosch* suggests that its holding does not apply outside of the estate-tax context. In *Aquilino v. United States,* 363 U.S. 509, 80 S.Ct. 1277, 4 L.Ed.2d 1365 (1960), the Court made the following observation:

> It is suggested that the definition of the taxpayer's property interests should be governed by federal law, although supplying the content of this nebulous body of federal law would apparently be left for future decisions. We think that this approach is unsound because it ignores the long-established role that the States have played in creating property interests and places upon the courts the task of attempting to ascertain a taxpayer's property rights under an undefined rule of federal law. It would indeed be

> anomalous to say that the taxpayer's "property and rights to property" included property in which, under the relevant state law, he had no property interest at all.

Id. at 513 n. 3, 80 S.Ct. 1277. More recently, in *United States v. Craft,* 535 U.S. 274, 122 S.Ct. 1414, 152 L.Ed.2d 437 (2002), the Court held that "[s]tate law determines only which sticks are in a person's bundle. Whether those sticks qualify as 'property' for purposes of the federal tax lien statute is a question of federal law." *Id.* at 278-79, 122 S.Ct. 1414; *see also Pahl v. Comm'r,* 150 F.3d 1124, 1128 (9th Cir.1998) (holding that "we look to federal law to determine what interest creates tax liability. We look, however, to state law to determine whether the taxpayer has the requisite interest.").

Even assuming that the state court judgment is binding as to the ownership of the funds, the question becomes what the state court judgment determined. At a minimum, the state court determined that the money Boulware transferred to Lee was not a gift. The money could still be income to Boulware, however, if he gave it to Lee to hold for him in an effort to hide it from the IRS. *See Chism v. Comm'r,* 322 F.2d 956, 959-60 (9th Cir.1963) (holding ***805** that the tax court did not err in refusing to be bound by a state court determination that withdrawals from a closely-held corporation were loans and not dividends, because "it is not the existence of a legal obligation to repay that is controlling"; rather, whether a withdrawal is a loan "is a factual question 'to be determined upon consideration of all the circumstances present in a particular case, and depends upon the existence of an intent at the time the withdrawal is made that it should be paid back.' " (quoting *Clark v. Comm'r,* 266 F.2d 698, 710-11 (9th Cir.1959))).

Boulware argues that the state court finding that Lee was holding the money in trust for HIE is also binding. The state court did find that the money in question belonged to HIE and that Lee had been and was holding it in "constructive trust" for HIE. On the other hand, although the record from the state court action is not part of the record on appeal, the ownership of the money as between Boulware and HIE does not appear to have been subject to adversarial testing. The special verdict form asked the jury to determine ownership only as between Lee and HIE, presumably because Boulware never claimed the money was his. If Lee maintained that she had received the money as a gift, and Boulware contended that he had given her the money to hold in trust for HIE, there would have been no reason to ask the jury if Boulware owned the money, because it was not an issue in the lawsuit.

For these reasons, we hold that the district court did not err in ruling that the state court judgment does not have preclusive effect as to the ownership of the monies.

b. *Was the State-Court Judgment Admissible Evidence?*

(1) *Relevance*

Even though the state court judgment did not have preclusive effect, the question still remains whether it was admissible evidence that the district court improperly excluded. The district court excluded the state court judgment pursuant to Federal Rules of Evidence 401 and 402, stating that whether the transfers to Lee were gifts "is not relevant to the ultimate issues of the case." This ruling was erroneous. Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable

than it would be without the evidence." Fed.R.Evid. 401. Whether Boulware transferred the HIE funds to Lee for personal purposes or for her to hold in trust for HIE was a key issue in the case. That he pursued a successful litigation against Lee to force her to return the monies to HIE has some tendency to make it more likely that he gave the monies to her to hold in trust. Indeed, the government conceded at oral argument that the state court judgment is relevant. [FN3]

> FN3. The dissent's argument that the judgment "does not prove, or even tend to prove" that Boulware did not siphon off the money from HIE is mistaken, both legally and factually. For evidence to be relevant, and thus admissible, Rule 401 does not require that it "prove" anything. Rule 401's only requirement is that the proffered evidence have a *tendency* to prove a fact in issue and the judgment certainly has *some* tendency to make Boulware's explanation (that he gave the money to Lee to hold in trust for HIE) more probable and the government's theory of the case (that he simply gave the money to Lee) less probable. Rule 401 requires no more.

(2) *Hearsay*

Hearsay is "a statement other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter ***806** asserted." Fed.R.Evid. 801(c). A prior judgment is therefore hearsay to the extent that it is offered to prove the truth of the matters asserted in the judgment. A prior judgment is not hearsay, however, to the extent that it is offered as legally operative verbal conduct that determined the rights and duties of the parties. *See United States v. Pang,* 362 F.3d 1187, 1192 (9th

Cir.2004). Although Rule 803 contains exceptions for certain kinds of judgments, such as judgments of previous felony convictions and judgments as to personal, family, or general history or boundaries, *see* Fed.R.Evid. 803(22) & (23), civil judgments do not fit comfortably into any hearsay exception. [FN4]

> FN4. Certain kinds of judgments fall under statutory or common law exceptions. *See, e.g.,* 15 U.S.C. § 16(a) (providing that "[a] final judgment or decree heretofore or hereafter rendered in any civil or criminal proceeding brought by or on behalf of the United States under the antitrust laws to the effect that a defendant has violated said laws shall be prima facie evidence against such defendant in any action or proceeding brought by any other party against such defendant under said laws as to all matters respecting which said judgment or decree would be an estoppel as between the parties thereto").

Boulware argues that the state court judgment fits the exceptions set forth in Rule 803(14) and (15). The first of these exceptions concerns records of documents that affect an interest in property, and reads as follows:

> **Records of documents affecting an interest in property.** The record of a document purporting to establish or affect an interest in property, as proof of the content of the original recorded document and its execution and delivery by each person by whom it purports to have been executed, if the record is a record of a public office and an applicable statute authorizes the recording of documents of that kind in that office.

Fed.R.Evid. 803(14).

In *United States v. Perry,* 857 F.2d 1346 (9th Cir.1988), a criminal tax prosecution, the government introduced testimony regarding a bankruptcy court's determination that certain transfers of property were fraudulent conveyances. *Id.* at 1351. We held that admission of the testimony was not plain error:

> The challenged testimony was not, as Perry urges, offered as substantive proof of a fraudulent scheme. A review of the record shows that the testimony was offered only to show that Perry was the true owner of certain properties nominally owned by his relatives. *See Greycas, Inc. v. Proud,* 826 F.2d 1560, 1567 (7th Cir.1987) ... ("a judgment, insofar as it fixes property rights, should be admissible as the official record of such rights, just like other documents of title"). This evidence, in turn, was relevant to prove that Perry had concealed his assets. From it, the jury could infer that Perry had intended to evade federal income taxes, charges for which he was on trial.

Id. at 1351-52 (footnote and ending citation omitted). Similarly, in *Greycas, Inc. v. Proud,* 826 F.2d 1560 (7th Cir.1987), a case on which *Perry* relied, the Seventh Circuit noted that the state court judgment at issue in the case should be admissible under Rule 803(14) to show the priority of liens, "fix[ing] Greycas's rights, equivalent to title, in Crawford's farm machinery." *Id.* at 1567 (citing Rule 803(14)).

Thus, *Perry* supports the proposition that a previous judgment is admissible under Rule 803(14) to show the

ownership of assets. To the extent that Boulware offered the judgment simply for the purpose of establishing HIE's ownership of the funds in 1997 and Lee's legal obligation to return those funds, he was offering ***807** the judgment not for the truth of the matters asserted in the judgment, but rather to establish the judgment's legal effect. As this is a nonhearsay purpose, we see no need to resort to the hearsay exception set forth in Rule 803(14).

Moreover, to the extent that Boulware offered the judgment for the truth of the matters asserted--to establish that he had not gifted the funds to Lee and that she was and had been holding them in constructive trust for HIE-- the judgment meets the exception set forth in Rule 803(15):

> **Statements in documents affecting an interest in property.** A statement contained in a document purporting to establish or affect an interest in property if the matter stated was relevant to the purpose of the document, unless dealings with the property since the document was made have been inconsistent with the truth of the statement or the purport of the document.

The Federal Rules of Evidence are an act of Congress, and we must therefore interpret Rule 803(15) as we would a statute, *see Daubert v. Merrell Dow Pharms., Inc.,* 509 U.S. 579, 587, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993), in accordance with its plain meaning, *see Bourjaily v. United States,* 483 U.S. 171, 178-79, 107 S.Ct. 2775, 97 L.Ed.2d 144 (1987) (interpreting Rule 104 in accordance with its plain meaning); *see also Garcia v. United States,* 469 U.S. 70, 75, 105 S.Ct. 479, 83 L.Ed.2d 472 (1984) (noting that "only the most extraordinary showing of contrary intentions from [the

legislative history] would justify a limitation on the 'plain meaning' of the statutory language").

Under the plain meaning of Rule 803(15), hearsay statements are admissible if they are contained within a document that affects an interest in property, if the statements are relevant to the purport of the document, and if dealings with the property since the document was made have not been inconsistent with the truth of the statements. *See Silverstein v. Chase,* 260 F.3d 142, 149 (2d Cir.2001). Here, the state court judgment meets each of these requirements. The judgment affected an interest in property by declaring HIE to be the legal owner of the funds and by requiring Lee to return them to HIE, and the statements are relevant to the purport of the document. In addition, there is no indication that the parties acted inconsistently with the judgment; it was undisputed that the judgment was valid and could be authenticated.

The legislative history is not clearly to the contrary. The Advisory Committee's note to Rule 803(15) explains that "[d]ispositive documents often contain recitals of fact" and that "[u]nder the rule, these recitals are exempted from the hearsay rule." Although the note uses the example of a deed, a judgment that establishes the ownership of disputed items of property is no less of a dispositive document, and the judgment's recital of facts is no less exempt from the hearsay rule. For these reasons, we hold that the state court judgment was admissible under Rule 803(15) as a document that affected an interest in property.

Finally, the district court excluded on relevance grounds not only the state court judgment and testimony about the judgment, but also testimony about the underlying lawsuit

between Lee and Boulware. For example, the court would not allow Boulware's tax attorney to testify about the lawsuit for the nonhearsay purpose explaining why he had advised Boulware not to list the monies transferred to Lee as income. For all of the reasons discussed above, the hearsay rule did not prohibit Boulware from introducing the state court judgment or testimony about the underlying lawsuit.

***808** (3) *Rule 403*

In its motion in limine to exclude the state court judgment, the government argued that the judgment was unreliable, and admitting the judgment would confuse the jury and would lead to a mini-trial to show the deficiencies in the evidence considered in the state case.

At a minimum, the state court's finding that HIE owned the money in 1997 was relevant to show that HIE had owned the money all along and to rebut the government's suggestions that Boulware had concocted the whole "Lee as trustee" story to defend himself in the criminal prosecution. [FN5] Any danger that the jury would have given undue weight to the state court judgment could have been dealt with by a cautionary instruction. Likewise, even if introduction of the judgment would have led the prosecution to cross-examine witnesses about deficiencies in the evidence heard by the state court jury, the trial judge should easily have been able to control any waste of time or confusion of the issues, so that admission of the state court judgment would not have substantially outweighed the probative value of the evidence. [FN6]

FN5. The prosecutor argued, for example, that there was no evidence that Boulware owed his wife anything "except in the rather fertile imagination of [his counsel]."

FN6. The dissent "would hold that the district court did not abuse its discretion in ruling the Hawaiian judgment inadmissible," based on its belief that the district court conducted an "[i]mplicit ... evaluation of probative value." The district court, however, did not perform a Rule 403 balancing analysis; rather, it simply held that the evidence was "not relevant to the ultimate issues of the case" and granted the government's motion to exclude the judgment "pursuant to Rules 401 and 402 of the Federal Rules of Evidence." We therefore review de novo, rather than for abuse of discretion, whether the judgment was properly excludable under Rule 403.

(4) *Harmless Error*

Although it was error to exclude the state court judgment, the error is not reversible if it was harmless. If the error amounts to a constitutional violation, we apply the "harmless beyond a reasonable doubt" standard. *See Chapman v. California,* 386 U.S. 18, 24, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967).

"[N]ot every hearsay error amounts to a constitutional violation. At a minimum, a defendant must demonstrate that the excluded evidence was important to his defense." *United States v. Lopez-Alvarez,* 970 F.2d 583, 588 (9th Cir.1992); *see also United States v. Saenz,* 179 F.3d 686, 689 (9th Cir.1999) (holding that "[e]rror cannot be harmless where it prevents the defendant from providing an evidentiary basis for his defense"). Here, the state-court judgment was crucial

to Boulware's defense on the tax counts, and the judgment directly contradicted the government's theory of the case. The district court's exclusion of the judgment denied Boulware "a meaningful opportunity to present a complete defense," *Lopez-Alvarez,* 970 F.2d at 587- 88, and thus violated his due process rights. We must therefore reverse unless the error was harmless beyond a reasonable doubt.

The government argues that the error was harmless because Boulware himself testified on direct examination about the judgment. [FN7] Boulware makes the point, ***809** however, that he was the least effective witness to testify about the judgment because of his perceived self-interest and bias. In addition, although he called witnesses who testified that HIE at all times owned the funds that he transferred to Lee and that he relied in good faith on the advice of his lawyer and accountants in not reporting the funds on his tax returns, he points out that the prosecution sharply attacked the credibility of these witnesses, and the judgment would have been key corroborative evidence.

FN7. Boulware's testimony on this subject was as follows:

> Q. So, during that time period, in the spring of '94, after you got your divorce, did Jin Sook Lee agree to return the company's money to HIE?
> A. No.
> Q. Did you end up in lawsuits with Jin Sook Lee to force her to return the money?
> A. Yes.
> Q. And then approximately in 1997, was Jin Sook Lee forced to return money to the company?
> A. Yes.
> Q. Approximately how much? A. Five, six million.

Q. I'm sorry?
A. Five, six million.
Q. But during the time period from 1994 to '97, the company didn't receive its money back from Jin Sook Lee, did it?
A. No.

Another reason the exclusion of the state court judgment may have been harmless is that Boulware's story was somewhat implausible. Rather than setting up a formal arrangement by which money would be held in trust to buy out his wife's interest in HIE, Boulware gave corporate money to his girlfriend. In addition, he transferred the money to her in a series of shady transactions. Rather than putting the cash in a bank account so that it could earn interest, Lee held the cash in a safe in their home. Finally, Boulware did not sue Lee for a return of the funds until she sued him.

Nevertheless, the beneficial ownership of the funds that Boulware transferred to Lee was central to the entire case against him, and the government did not call Lee or any other witness to rebut Boulware's claim that he gave the money to her to hold in trust for the purchase of his ex-wife's marital interest. [FN8] Boulware's attorney Michael McCarthy testified that in 1987 Boulware retained him to establish a trust for Boulware and Lee's nonmarital son, Glenn Lee Boulware. Half of the shares of HIE were put into the trust. McCarthy advised Boulware that Lee, as the trustee of a trust that held a 50% ownership interest in HIE, would be a constructive trustee of any assets she received that belonged to HIE. He advised Boulware that any HIE property given to Lee would continue to belong to HIE, and would never belong to Lee or Boulware.

FN8. The government did call Boulware's ex-wife, Mal Sun Boulware, to the stand, but she did not necessarily help the government's case. On cross-examination, she confirmed that when Boulware asked her for a divorce in 1987, she demanded $5 million and a $1 million house because she believed she had an ownership interest in HIE.

In the end, we are not convinced beyond a reasonable doubt that the jury would have arrived at the same verdict had testimony regarding the state court judgment and the judgment itself not been excluded. We therefore reverse Boulware's convictions on all of the tax evasion and false tax return counts and remand for a new trial.

B. Sufficiency of the Evidence

Boulware also contends that we must reverse his convictions for filing false tax returns and tax evasion because the government failed to prove that he underreported his income. Although we reverse Boulware's conviction, we must still consider his contention that the evidence was insufficient to sustain his conviction, ***810** because a challenge to the sufficiency of the evidence implicates a defendant's rights under the Double Jeopardy Clause. *See United States v. Recio,* 371 F.3d 1093, 1104 (9th Cir.2004); *United States v. Gergen,* 172 F.3d 719, 724-25 (9th Cir.1999).

1. Standard of Review

Where, as here, the defendant made timely motions for acquittal, we review his insufficiency of the evidence claim de novo. *United States v. Odom,* 329 F.3d 1032, 1034 (9th Cir.2003). We will deny the claim if, viewing the evidence

in the light most favorable to the prosecution, any rational trier of fact could have found the elements of the crime proved beyond a reasonable doubt. *Id.*

2. Analysis

Boulware was convicted on counts 1-5 of filing false tax returns in violation of 26 U.S.C. § 7206(1) for the 1989-1993 tax years. He was also convicted on renumbered counts 6-9 of tax evasion in violation of 26 U.S.C. § 7201 for the 19941997 tax years.

The elements of the offense of filing false tax returns under § 7206(1) are as follows:

> (1) the defendant made and subscribed a return, statement, or other document that was incorrect as to a material matter; (2) the return, statement, or other document subscribed by the defendant contained a written declaration that it was made under the penalties of perjury; (3) the defendant did not believe the return, statement, or other document to be true and correct as to every material matter; and (4) the defendant falsely subscribed to the return, statement, or other document willfully, with the specific intent to violate the law.

United States v. Marabelles, 724 F.2d 1374, 1380 (9th Cir.1984). The elements of tax evasion under § 7201 are "(1) the existence of a tax deficiency, (2) willfulness in attempted evasion of taxes, and (3) an affirmative act constituting an evasion or attempted evasion." *Id.* at 1377- 78.

Boulware's convictions under §§ 7206(1) and 7201 hinge on the fact that he diverted funds from HIE but did not report them as income on his personal income tax returns. Boulware argues that although he controlled the funds in question, the government introduced no evidence that this control was inconsistent with ownership of the funds by HIE. Although the government argued to the jury that Boulware "stole" the money from HIE, the government did not establish any of the required elements of theft under Hawaii law. Finally, he argues, the diversions could not have constituted taxable constructive dividends, because HIE had no positive earnings or profits during the years charged in the indictment.

The sufficiency of the evidence issue boils down to whether the government could have proved the elements of §§ 7206(1) and 7201 beyond a reasonable doubt without proving either that Boulware stole the funds from HIE or that the funds were not loans or nontaxable returns of capital. *United States v. Miller,* 545 F.2d 1204 (9th Cir.1976), indicates that the answer to this question is "yes."

Miller, like this case, concerned the characterization of funds that a taxpayer diverted from his closely-held corporation. *Id.* at 1211. The defendant argued that his conviction for tax evasion could not stand, because the government had not proved that his corporation had any earnings and profits during the years in question. *Id.* at 1210. Therefore, his diversions must be treated as a return of capital. *Id.* at 1210-11. The court rejected this argument, stating that "[i]n a criminal ***811** tax proceeding the concern is not over the type or the specific amount of the tax which the defendant has evaded, but whether he has willfully attempted to evade the payment or assessment of a tax." *Id.* at 1214. The court also held that the defendant had the

burden of going forward once the government "demonstrates that the taxpayer had unexplained funds which *could be considered* as income which the taxpayer fails to report in his return." *Id.* at 1215 & n. 13 (emphasis added).

Boulware counters that the government did not make out a prima facie case on the false tax return and tax evasion counts because it used a bank-deposits method of proof and failed to investigate leads that were reasonably susceptible of being checked. In particular, HIE's comptroller testified to the grand jury that HIE had fully reported the $10.2 million at issue and submitted records in support of this contention. In addition, the government knew of a bankruptcy action in which the court affirmed the trustee's determination that assets held by Lee belonged to HIE.

The theory behind the bank-deposits method of proof was described long ago, as follows:

> [I]f it be shown that a man has a business or calling of a lucrative nature and is constantly, day by day and month by month, receiving moneys and depositing them to his account and checking against them for his own uses, there is most potent testimony that he has income, and, if the amount exceeds exemptions and deductions, that the income is taxable.

Gleckman v. United States, 80 F.2d 394, 399 (8th Cir.1935) (quoted in 2 Kenneth E. North, *Criminal Tax Fraud* § 23.41, at 405 (3d ed.1998)). When using the bank-deposits method of proof, the government must conduct an adequate and full investigation to remove non-income deposits, such as transfers between bank accounts. *United States v. Stone,* 770 F.2d 842, 844 (9th Cir.1985). "The critical question is

whether the government's investigation has provided sufficient evidence to support an inference that an unexplained excess in bank deposits is attributable to taxable income." *Id.* at 844-45. Although the government must be especially thorough in its investigation and presentation, "it is well settled that the government is not obliged to prove the exact amount of a deficiency so long as the taxpayer's understatement of income is substantial." *Id.* at 845.

Here, the government witness who performed the bank-deposits analysis, Jerry Yamachika, testified that he "eliminated ... any loans that may have come--that Mr. Boulware might have gotten from his company...." On cross-examination, Yamachika testified that he credited Boulware with deductions for money in the bank accounts that was used to buy coffee, and that "an analysis was done as to what credit he was given on his loan account at the corporation to reduce his loan for the purchases he made." Based on the testimony at trial, "[t]he evidence was more than adequate to support the inference that the defendant's bank deposits were income from [HIE] and were in fact currently taxable but unreported income." *Id.* at 845.

Boulware argues that even if the government did make out a prima facie case, he met his burden of going forward with the evidence by testifying that the diversions were loans and were accounted for as such on HIE's books. This put the burden back on the government to prove the deposits were not loans. The nature of the transactions, however, was sufficient evidence for a rational juror to conclude beyond ***812** a reasonable doubt that the deposits were not loans.

We conclude that there was ample evidence from which a rational juror could have concluded that Boulware was

guilty of willfully submitting false tax returns for the 1989-1993 tax years and of willfully evading taxes for the 1994-1997 tax years.

C. Other Asserted Trial Errors

Boulware further contends that his conviction should be reversed because of a number of asserted trial errors, including constructive amendment of the indictment by the prosecutor and prosecutorial misconduct. Most of these errors, however, were not objected to at trial; therefore, we would review them under the plain error rule of Fed.R.Crim.P. 52(b). *See, e.g. United States v. Dipentino,* 242 F.3d 1090, 1094 (9th Cir.2001). We see no useful purpose in reviewing these asserted errors. First, a ruling under plain error review will give the district court little assistance on retrial on how it should rule if a timely objection is made. Second, we will not assume that any trial error is likely to be repeated in a retrial.

We briefly address Boulware's Confrontation Clause claim, however, because it relates directly to his conviction for conspiracy to make false statements to a federally-insured financial institution. Boulware contends that the district court violated his rights under the Confrontation Clause by limiting his cross-examination of Lorin Kushiyama, his alleged co-conspirator on count 10. Whether limitations on cross-examination violate the Confrontation Clause is a question that we review de novo. *United States v. Adamson,* 291 F.3d 606, 612 (9th Cir.2002).

Boulware argues that the district court would not allow him to cross-examine Kushiyama about whether he agreed with Boulware to submit fraudulent invoices, an essential

element of the conspiracy charge. The district court sustained a string of objections on relevance grounds to questions regarding whether Kushiyama had prepared invoices or appraisals for *other parties*. When defense counsel asked Kushiyama "As far as these invoices, you are not the--intending to submit fake invoices to anyone, were you?," the judge sustained the government's objection and defense counsel did not pursue the matter further.

Although it is not completely clear whether "these invoices" referred to those prepared for Boulware or to ones prepared for other customers, the court was obviously under the impression that they referred to invoices for other parties and defense counsel did nothing to disabuse him of this impression. Defense counsel did not reword the question, explain to the court that he was inquiring about the invoices at issue in this case, or call Kushiyama as a defense witness.

For these reasons, the limitation on the cross-examination of Kushiyama was not so severe as to amount to a violation of Boulware's Confrontation Clause rights.

D. Sentencing Issues

Among other sentencing issues, Boulware contends that the district court erred in its calculation of the tax loss attributed to his offense, including the court's failure to hold an evidentiary hearing. In its cross-appeal the government contends that the district court erred in declining to enhance Boulware's sentence for obstruction of justice. Given our reversal and remand for a new trial on the tax counts, no purpose would be served by our review of the sentencing issues.

Sentence was imposed in this case well before *Blakely v. Washington,* --- U.S. ----, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004), wrought a sea change in sentencing, ***813** and *United States v. Ameline,* 376 F.3d 967 (9th Cir.2004), held that *Blakely* was applicable to certain aspects of sentencing under the U.S. Sentencing Guidelines. [FN9] Under these circumstances, because we are reversing and remanding for a new trial on most counts, in the event there is a conviction (and in any event on the remaining, unreversed count) when the district court resentences Boulware, it will be under the then extant post-*Blakely* regime.

FN9. The Supreme Court has granted certiorari in two cases, *United States v. Booker,* --- U.S. ----, 125 S.Ct. 11, 159 L.Ed.2d 838, 2004 WL 1713654 (U.S. Aug. 2, 2004), and *United States v. Fanfan,* --- U.S. ----, 125 S.Ct. 12, 159 L.Ed.2d 838, 2004 WL 1713655 (U.S. Aug. 2, 2004), which present the question of *Blakely's* application to the U.S. Sentencing Guidelines.

We must, however, address Boulware's challenge to the district court's forfeiture order, because we affirm his conviction for conspiracy to make false statements to a federally insured financial institution and because Boulware waived his right to a jury determination of the forfeiture issue.

Boulware argues that the district court's forfeiture order was erroneous, because it did not give him credit for funds he returned to the lender. The jury convicted Boulware of renumbered count 10 of the indictment, conspiracy to make false statements to a federally-insured financial institution, but acquitted him of the substantive charges (counts 11-14). Renumbered count 15 of the indictment charged that

Boulware shall forfeit proceeds that he obtained directly or indirectly as a result of the offenses charged in counts 10-14.

18 U.S.C. § 982(a)(2) provides:

> The court, in imposing sentence on a person convicted of a violation of, or a conspiracy to violate-
>
> (A) section ... 1014 ... of this title, affecting a financial institution ...
>
> * * *
>
> shall order that the person forfeit to the United States any property constituting, or derived from, proceeds the person obtained directly or indirectly, as the result of such violation.

Nothing in the text of the statute entitles Boulware to a set-off for loan proceeds that he repaid to GECC. In fact, § 982(b)(1) incorporates the provisions of 21 U.S.C. § 853(c), which provides that "[a]ll right, title, and interest in property described in subsection (a) of this section vests in the United States upon the commission of the act giving rise to forfeiture under this section." Finally, that defendants may be required to pay restitution and forfeit the same amounts indicates that Boulware is not entitled to receive a credit for funds he returned. *Cf. United States v. Bright,* 353 F.3d 1114, 1125 (9th Cir.2004) (holding that forfeited funds need not be applied toward restitution); *United States v. Feldman,* 853 F.2d 648, 663-64 (9th Cir.1988) (holding that the sentencing option of ordering restitution "is not denied to the district court because a defendant must also forfeit the proceeds of illegal activity").

The district court did not err in failing to reduce the amount of the forfeiture. The criminal forfeiture statute contains nothing comparable to the civil forfeiture statute's provision that "[i]n cases involving fraud in the process of obtaining a loan or extension of credit, the court shall allow the claimant a deduction from the forfeiture to the extent that the loan was repaid, or the debt was satisfied, without any financial loss to the victim," Civil Asset Forfeiture Reform Act of 2000, Pub.L. 106-***814** 185, 114 Stat. 202, § 20(b), *codified at* 18 U.S.C. § 981(a)(2)(C).

IV

We reverse Boulware's conviction for tax evasion and filing false tax returns and affirm his conviction for conspiracy to make false statements to a federally-insured financial institution. We vacate his sentence on the false statement count and remand for further proceedings consistent with this opinion.

AFFIRMED in part, REVERSED in part, and REMANDED.

SILVERMAN, Circuit Judge, dissenting:

In my view, the district court did not abuse its discretion in refusing to admit the state court judgment into evidence. The judgment does no more than establish that, as between Jin Sook Lee and Hawaiian Isles Enterprises, the money belonged to Hawaiian Isles Enterprises. This has no bearing on whether Boulware diverted corporate funds to his girlfriend for his own benefit without paying tax on the money. The judgment establishes only that *she* was not entitled to keep the cash. It does not prove, or even tend to prove, that *he* didn't siphon off the money from the

corporation, tax-free. Why would it? That was not at issue in the case.

District courts have wide latitude in ruling on the relevancy of evidence. *United States v. Alvarez,* 358 F.3d 1194, 1216 (9th Cir.2004). Implicit in any such ruling is an evaluation of probative value. 1 McCormick on Evidence § 185, at 637 (5th ed. 1999) ("There are two components to relevant evidence: materiality and probative value."). Because the state court judgment against Lee sheds little if any light on whether Boulware committed tax evasion, I would hold that the district court did not abuse its discretion in ruling the Hawaiian judgment inadmissible. I would affirm the district court and, therefore, respectfully dissent.

APPENDIX B

NOT FOR PUBLICATION

No. 02-10287

UNITED STATES OF AMERICA, Plaintiff-Appellee,

vs.

MICHAEL H. BOULWARE, Defendant-Appellant.

D.C. No. CR 99-0239 ER.

AMENDED ORDER

No. 02-10338

UNITED STATES OF AMERICA, Plaintiff-Appellant,

vs.

MICHAEL H. BOULWARE, Defendant-Appellee.

D.C. No. CR 99-0239 ER

ORDER

Filed February 1, 2005

Before TASHIMA, THOMAS, and SILVERMAN, Circuit Judges.

Appellant's petition for panel rehearing, and the petition for panel rehearing for the appellee/cross-appellant are denied. With this amended order (in No. 02-10287) and order (in No. 02-10338), the motion for clarification of Plaintiff-Appellee/Cross-appellant is denied as moot. The mandate shall issue forthwith in No. 02-10338.

APPENDIX C

United States Constitution, Fifth Amendment

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

United States Constitution, Sixth Amendment

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

United States Constitution, Eighth Amendment

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflected.

28 U.S.C. §1738

The Acts of the legislature of any State, Territory, or Possession of the United States, or copies thereof, shall be authenticated by affixing the seal of such State, Territory or Possession thereto.

The records and judicial proceedings of any court of any such State, Territory or Possession, or copies thereof, shall be proved or admitted in other courts within the United States and its Territories and Possessions by the attestation of the clerk and seal of the court annexed, if a seal exists, together with a certificate of a judge of the court that the said attestation is in proper form.

Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken.

Supreme Court, U.S.
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(3)

No. 04-1468

In the Supreme Court of the United States

MICHAEL BOULWARE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court of appeals erred in concluding that a state jury verdict did not resolve whether certain funds belonged to petitioner.

2. Whether the district court violated the Confrontation Clause when it sustained an objection during petitioner's cross-examination of a government witness.

3. Whether the forfeiture of the entire proceeds of petitioner's conspiracy to make false statements to a federally insured financial institution violated the Eighth Amendment's Excessive Fines Clause.

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In the Supreme Court of the United States

No. 04-1468

MICHAEL BOULWARE, PETITIONER

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UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A36) is reported at 384 F.3d 794 (9th Cir. 2004).

JURISDICTION

The judgment of the court of appeals was filed on September 14, 2004. A petition for rehearing was denied on February 1, 2005 (Pet. App. B1). The petition for a writ of certiorari was filed on May 2, 2005. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

On November 29, 2001, a jury found petitioner guilty on five counts of filing false tax returns, in violation of 26 U.S.C. 7206(1), four counts of tax evasion, in violation of 26 U.S.C. 7201, and one count of conspiring to make a

false statement to a federally insured financial institution, in violation of 18 U.S.C. 371. The court of appeals affirmed in part, reversed in part, vacated the sentence, and remanded the case for further proceedings consistent with its opinion.

1. a. Petitioner was the founder, chief executive officer, and part-owner of Hawaiian Isles Enterprises, Inc. (HIE), a Hawaiian corporation dealing in tobacco distribution, coffee processing and sales, arcade games, vending machines, and bottled water. Between 1989 and 1993, petitioner diverted millions of dollars from HIE and failed to report or to pay taxes on this income. Pet. App. A3-A4, A30-A31.

b. In addition, in 1992 petitioner engaged in a scheme, with Lorin Kushiyama, to obtain a loan for HIE from General Electric Credit Company (GECC), an organization insured by the Federal Deposit Insurance Corporation, by submitting fraudulent invoices. Specifically, Kushiyama prepared invoices listing equipment that he purportedly leased to HIE, and GECC would pay the invoices for HIE; the equipment on the invoices, however, was already owned by HIE. Pet. 4. Under this arrangement, GECC paid Kushiyama $495,814.80, and Kushiyama gave these proceeds to petitioner. Pet. App. A4.

c. Petitioner, who was seeking to divorce his wife, purportedly intended to use the money diverted from HIE and acquired from GECC to buy out his wife's interest in HIE. Upon learning about this plan, petitioner's girlfriend, Jin Sook Lee, requested that she hold the funds until petitioner accumulated enough money to acquire his wife's interest. By 1994, petitioner had collected $5 million, enough money to purchase his wife's

interest. Lee, however, refused to return the money to petitioner. Pet. 4-5.

In 1994, after petitioner had become aware of the IRS investigation, petitioner and HIE filed claims in Hawaii state court against Lee, seeking the return of the money on the ground that it belonged to HIE. In 1997, after a trial, a jury found by a special verdict that the money transferred to Lee did not constitute a gift to her and that the money belonged to HIE. Pet. App. A9.

2. In 2000, petitioner was charged with, *inter alia*, five counts of filing false tax returns, in violation of 26 U.S.C. 7206(1), and four counts of attempted tax evasion, in violation of 26 U.S.C. 7201. He also was charged with four counts of making false statements to a federally insured financial institution, in violation of 18 U.S.C. 1014 (2000 & Supp. II 2002), and one count of conspiring to make such statements, in violation of 18 U.S.C. 371, for his scheme to obtain a loan from GECC. The indictment also sought forfeiture of the proceeds of the loan under 18 U.S.C. 982(a)(2)(A).

Before trial, petitioner moved to adopt as controlling the Hawaii state court's determination that the money that had been transferred to Lee belonged to HIE and therefore was not taxable income to him. The court denied petitioner's motion. The court explained that the state judgment did not establish that petitioner did not own the money, because the state case dealt only with ownership of the funds as between Lee and HIE and did not determine ownership as between HIE and petitioner. Pet. App. A10. Furthermore, on the government's motion, the court excluded all evidence of the state court's verdict, concluding that it was not relevant to "the ultimate issues of the case." *Id.* at A11.

On November 29, 2001, the jury found petitioner guilty on all nine tax counts. It also found him guilty of conspiring to make false statements to a federally insured financial institution, but acquitted him of the substantive false statements counts. The court sentenced petitioner to 36 months of imprisonment on each of the false tax return counts, 51 months of imprisonment on each of the tax evasion counts, and 51 months of imprisonment on the conspiracy count, with all sentences running concurrently. Pet. App. A3. The court also ordered petitioner, who had waived a jury trial on the forfeiture count, to forfeit the entire $495,814.80 loan from GECC, rejecting petitioner's argument that he should receive a credit for the amount of the loan that had already been repaid to GECC.

3. The court of appeals affirmed in part, reversed in part, vacated the sentence, and remanded. Pet. App. A1-A35.

a. The court reversed petitioner's conviction for filing false tax returns and for attempted tax evasion. The court rejected petitioner's argument that the Hawaii state judgment precluded the government from relitigating that the money that had been transferred to Lee belonged to HIE, from which it would follow that the funds were not taxable income to petitioner. The court held that, even if state court determinations about ownership are binding for federal tax purposes, the Hawaii court's decision did not resolve whether the money constituted income to petitioner, because the state court decision determined ownership of the funds as between Lee and HIE, and not as between petitioner and HIE. Pet. App. A15-A16. The court held, however, that the district court had committed reversible error by excluding the state court judgment as irrelevant, because the

judgment corroborated petitioner's testimony that the funds were owned by HIE. *Id.* at A22-A25.

The court of appeals affirmed petitioner's conviction for conspiring to make a false statement to a federally insured institution. It rejected petitioner's argument that the district court had violated the Confrontation Clause by sustaining the government's objection during petitioner's cross-examination of Kushiyama to the following question: "As far as these invoices, you are not the—intending to submit fake invoices to anyone, were you?" The court of appeals explained that this question had come after a series of irrelevant questions about whether Kushiyama had prepared invoices for other parties, and that the district court had clearly understood this question also to refer, not to invoices prepared for petitioner, but to invoices prepared for third parties. Observing that defense counsel could have rephrased the question or explained to the district court that he was inquiring about the invoices in this case, the court of appeals concluded that petitioner's right to confront Kushiyama had not been violated. Pet. App. A31-A32.

The court vacated petitioner's sentence on the conspiracy count, however, directing that petitioner be sentenced in accordance with *Blakely* v. *Washington*, 124 S. Ct. 2531 (2004). Pet. App. A33.

Finally, the court of appeals affirmed the forfeiture order. The court rejected petitioner's argument that the forfeiture order should be reduced by the amount GECC had been repaid, explaining that nothing in 18 U.S.C. 982(a)(2) entitled petitioner to a credit for the repayment. Pet. App. A33-A34.

b. Judge Silverman dissented in part. Pet. App. A35-A36. In his view, the Hawaii judgment was irrelevant to whether petitioner owned the money diverted to

Lee. He therefore would have affirmed all of petitioner's convictions.

ARGUMENT

Petitioner raises three challenges to the court of appeals' decision in this case. First, he argues (Pet. 6-15) that the court erred in rejecting his claim that the state court judgment precluded the government from relitigating the ownership of the money transferred to Lee. Second, he claims (Pet. 15-28) that the district court erred by improperly limiting his cross-examination of Kushiyama. Finally, he maintains (Pet. 28-29) that the forfeiture order violates the Eighth Amendment's prohibition against excessive fines. These claims do not warrant review.

1. Petitioner contends that this Court should grant a writ of certiorari to resolve whether *Commissioner* v. *Estate of Bosch*, 387 U.S. 456 (1967), which holds that federal courts, in assessing federal estate tax liability, are not bound by state probate court determinations about property interest, applies outside the estate-tax context. That question, however, is not presented in this case.

In this case, the court of appeals held that, even assuming that a state court's determination of ownership was binding in subsequent tax cases, the Hawaii judgment did not resolve whether the money belonged to HIE or petitioner. Pet. App. A15-A16. Thus, the significance of *Bosch* outside the estate-tax context is not at issue in this case. Although petitioner disputes what the state court resolved, that fact-bound contention does not warrant this Court's review.

In any event, the court of appeals' conclusion was correct. The dispute in the Hawaii case was whether

Lee had received the money as a gift or whether she had been given the money to hold in trust for HIE. In resolving that dispute, the jury determined only that HIE had a better claim to the money than Lee did. Pet. App. A16. The jury did not determine whether the money belonged to HIE or petitioner, because that was not an issue in the lawsuit.

2. Petitioner next argues (Pet. 15-28) that the district court violated the Confrontation Clause when, during his cross-examination of Kushiyama, it sustained the government's objection to his question "[a]s far as these invoices, you are not the—intending to submit fake invoices to anyone, were you?" According to petitioner (Pet. 27), this purported error, when combined with the court's purported error in refusing to give preclusive effect to the state jury verdict, requires that his conviction be reversed.

Petitioner's fact-bound contention that the district court violated his right to confront Kushiyama does not warrant this Court's review. Contrary to petitioner's contention (Pet. 21), the court of appeals correctly concluded that the district court did not impermissibly prevent petitioner from asking Kushiyama whether he "intended to submit false invoices to GECC." This Court has recognized that "trial judges retain wide latitude insofar as the Confrontation Clause is concerned to impose reasonable limits on such cross-examination based on concerns about * * * interrogation that is repetitive or only marginally relevant." *Delaware* v. *Van Arsdall*, 475 U.S. 673, 679 (1986). In this case, as the court of appeals explained, the district court concluded that petitioner's question was irrelevant, because it understood petitioner's question, like the questions preceding it, to refer to invoices prepared for third parties. Petitioner's

counsel could have rephrased the question or explained to the district court that he was inquiring about the invoices at issue in this case. The district court therefore did not unduly restrict petitioner's right to cross-examine Kushiyama on that point. See *ibid.* Although petitioner contends (Pet. 24-25) that the question was relevant even if it did refer to invoices prepared for others, petitioner did not present that argument to the district court or to the court of appeals, and this Court should not pass on that fact-bound claim in the first instance. See *Pennsylvania Dep't of Corr.* v. *Yeskey*, 524 U.S. 206, 212-213 (1998).

3. Finally, petitioner contends (Pet. 28-29) that the forfeiture of the entire $495,814.80 loan from GECC violates the Eighth Amendment's Excessive Fines Clause as interpreted in *United States* v. *Bajakajian*, 524 U.S. 321 (1998). In *Bajakajian*, this Court held that "a punitive forfeiture violates the Excessive Fines Clause if it is grossly disproportional to the gravity of a defendant's offense." *Id.* at 334. In applying that test, the Court considered (1) whether the offense leading to forfeiture was related to other illegal activities; (2) whether the defendant fit into the class of persons for whom the statute was designed; (3) the other possible penalties for the offense; and (4) the harm caused by the offense. *Id.* at 336-340.

As petitioner notes, the Eighth Circuit has concluded that under *Bajakajian* a forfeiture order may be excessive under the Eighth Amendment if it is not reduced when a defendant has returned a portion of the illegally obtained assets. See *United States* v. *Hawkey*, 148 F.3d 920, 928 (1998). In this case, however, the court of appeals did not address whether the forfeiture order violated the Eighth Amendment; the only argument that

petitioner made and that the court considered about forfeiture was whether 18 U.S.C. 982(a)(2) entitled petitioner to a credit. Pet. App. A34. The court of appeals' decision therefore does not present a conflict warranting this Court's review. Moreover, this Court should not consider petitioner's Eighth Amendment claim in the first instance. See *Capital Cities Cable, Inc.* v. *Crisp*, 467 U.S. 691, 697 (1984).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JULY 2005

Petitioner does not argue in this Court that he is entitled to a credit under 18 U.S.C. 982(a)(2).

(2)

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NO. 04-1468

IN THE SUPREME COURT OF THE UNITED STATES

MICHAEL BOULWARE, Petitioner,

vs.

UNITED STATES OF AMERICA, Respondent

On Petition For Writ Of Certiorari To The United States Court of Appeals For The Ninth Circuit

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ARGUMENT

1. Petitioner contends this Court should grant a writ of certiorari to determine whether the government is precluded from relitigating the ownership of property in a federal criminal tax prosecution which was the subject of a bona fide state adversary proceeding, resulting in a civil judgment that determined the property interests among the litigants. This question was left unresolved in *Commissioner v. Estate of Bosch,* 387 U.S. 456 (1967) outside of the estate-tax context.

The government's brief in opposition argues that this question is not presented in this case, noting that the United States Court of Appeals for the Ninth Circuit ("Ninth Circuit") held that, even assuming that a state court's determination of ownership was binding in subsequent tax cases, the Hawaii judgment did not resolve whether the money belonged to Hawaiian Isles Enterprises, Inc. ("HIE") or petitioner because that determination was not at issue in the lawsuit. Therefore, the significance of *Bosch* outside the estate-tax context is not at issue in this case. Opp. Br. 6-7.

While recognizing that "[t]he state court did find that the money in question belonged to HIE and that Lee had been and was holding it in 'constructive trust' for HIE," the Ninth Circuit nevertheless erroneously concluded that "the ownership of the money as between Boulware and HIE does not appear to have been subject to adversarial testing." Pet. App. A16. The Ninth Circuit overlooked the fact that in the state action, the litigants were Jin Sook Lee, HIE and petitioner, each represented by separate counsel, and the heart of the controversy was the ownership of the monies and properties at issue.

The Hawaii judgment resulted from an adversarial proceeding initiated by Lee, prior to petitioner's indictment.

The Finding of Facts and Conclusions of Law from the Hawaii judgment specifically found there was an agreement[1/] between Boulware, HIE, and Lee that the funds belonged at all times to HIE, not Boulware. The jury's answer to question 10 on the special verdict form[2/] established that the funds belonged to HIE, not Boulware:

> *Question No. 10.* Jin Sook Lee claims the cash and checks delivered to her, during the period from March, 1987 to May, 1994, by Michael Boulware and Hawaiian Isles Enterprises were gifts. Michael Boulware and Hawaiian Isles Enterprises claim the monies were not gifts but were to be held by Jin Sook Lee and to be returned when requested. State your findings below:
>
> The monies were gifts to Jin Sook Lee Yes ____ No ✓
>
> The monies belong to Hawaiian Isle Enterprises Yes ✓ No ____

[1/] "3. There was a binding agreement between Plaintiff, Boulware and HIE to hold monies belonging to HIE to pay Mal Sun Boulware for her marital interest in HIE. Pursuant to that agreement, monies belonging to HIE were entrusted to Plaintiff until such time the monies were needed to pay Mal Sun for her interest in HIE. ER 86.

[2/] Reproduced in *United States v. Boulware*, 384 F.3d 794, 802 (9th Cir. 2004); Pet. App. A9-A10. Supp. ER 12-13.

If the jury had determined instead that the funds belonged to Boulware, not HIE, its answer to whether the monies belonged to HIE would have been "no," not "yes." The jury also distinguished between Boulware and HIE with regard to the $1,200,000 promissary note, in Final Finding 3.[3/] ER 74-75. Contrary to the Ninth Circuit's conclusion, when the totality of the findings in the judgment are viewed together, the ownership of the money as between Boulware and HIE was clearly the subject of adversarial testing. Boulware was bound[4/] by the state court judgment and could not thereafter assert any property interest in the monies and properties. Hence, the Ninth Circuit should have concluded that the state court judgment's determination of property interests was adversarial and binding on the government in petitioner's

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[3/] "As to Count III, judgment in favor of Defendant/Counterclaimant HAWAIIAN ISLES ENTERPRISES, INC. and against Plaintiff on Plaintiff's claim on the August, 1993 promissory note in the amount of $1,200,000 and Plaintiff shall take nothing on said claim against Defendant HAWAIIAN ISLES ENTERPRISES, INC. Furthermore, as to Count III, judgment in favor of Plaintiff and against Defendant/Counterclaimant MICHAEL BOULWARE in the amount of $250,000 on Plaintiff's claim on the August, 1993 promissory note in the amount of $1,200,000[.]"

[4/] Under Hawaii law claim preclusion prohibits a party from relitigating a previously adjudicated cause of action as well as all grounds of claim and defense which might have been properly litigated in the first action but were not litigated or decided. *Bremer v. Weeks*, 104 Haw. 43, 53, 85 P.3d 150, 160 (Haw. 2004). Since petitioner, as a party to the action, is precluded as a matter of state law from asserting any interest in the properties determined to belong to HIE by the Hawaii judgment, the judgment determined Boulware's interest in the monies and properties at issue.

federal criminal prosecution.[5/]

2. Although acquitted of the substantive false statement counts, petitioner was convicted of conspiring with Lorin Kushiyama to submit false invoices to General Electric Credit Company ("GECC") to divert monies from HIE to petitioner to avoid reporting those monies on his tax return. Kushiyama's intent in submitting the false invoices to GECC was critical in determining whether a conspiracy existed.

The government maintains that the Ninth Circuit correctly concluded that the district court did not impermissibly prevent petitioner from asking Kushiyama whether he "intended to submit false invoices to GECC." Opp. Br. 7. The government argues that the district court concluded that petitioner's question was irrelevant, because it understood petitioner's question, like the questions preceding it, to refer to invoices prepared for third parties. Since petitioner's counsel could have rephrased the question or explained to the district court that he was inquiring about the invoices at issue, the government contends that the district court did not unduly restrict petitioner's right to cross-examine Kushiyama on that point. Opp. Br. 7-8.

This argument should not be accepted. First, it is unclear why the district court sustained the objection, as no "legal ground" was articulated for the objection. 3 RT 59.[6/] Second,

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[5/] As noted in petitioner's Ninth Circuit reply/answering brief and petition for panel rehearing, the government had actual notice of and, as a creditor, had the opportunity to but did not object to the Hawaii judgment serving as the basis for the settlement of Lee's bankruptcy proceeding prior to petitioner's criminal prosecution.

[6/] "Q. As far as these invoices, you are not the -- intending to submit fake invoices to anyone, were you?

Mr. Osborne: Objection, your Honor.

The Court: Sustained. The objection is sustained."

although the district court was emphatic in sustaining this objection, it did not articulate its reason for sustaining the unspecified objection. *Id.* While the government now speculates that the objection was sustained on relevancy grounds because the district court assumed the question was directed to Kushiyama's appraisals for others, neither the government nor the district court articulated those grounds at trial, although the government clearly knew how to do so. 3 RT 56, 57.[7/] Given that the question from defense counsel's point of view clearly referred to the Exhibits at trial and how emphatic the court was in sustaining the objection, it is difficult to imagine that defense counsel would have been given the opportunity to rephrase the question. Third, the question was highly relevant even if defense counsel had intended to refer to invoices prepared by Kushiyama for others.

It is undisputed that Kushiyama's specific intent to submit false invoices was a critical element of the conspiracy to submit false documentation to GECC. Kushiyama, however, testified he had provided appraisals for Boulware, verifying there was sufficient collateral listed in each appraisal (invoice) to cover the amount of money financed by GECC. When defense counsel attempted to question Kushiyama about whether he intended to submit false invoices to GECC, the trial court refused to permit this question. 3 RT 59. This inquiry was critical because petitioner could not be guilty of the conspiracy unless Kushiyama intended to deceive GECC.

The government's reliance on the Ninth Circuit's explanation of the district court's ruling is misplaced. Although the Ninth Circuit correctly observed that

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[7/] "[Prosecutor]: Objection to the relevance of other parties.... Objection to the relevance of what he did --"

Kushiyama had been asked about preparing invoices or appraisals for other individuals, and objections had generally been sustained to these questions, that observation was irrelevant to the question posed to Kushiyama, challenged here, referring to **these invoices.** 3 RT 59; footnote 6, *supra*.

During direct examination, the prosecution admitted into evidence packages of invoices marked as Exhibits 36 and 45. 3 RT 37, 47-48. When defense counsel started cross examining Kushiyama, he referred to these Exhibits, the alleged false invoices, as "these invoices." 3 RT 54, 55, 56, and 58. While counsel asked Kushiyama about appraisals he had prepared for other people, it was clear that counsel's reference to "these invoices" referred to the invoices admitted into evidence and the question asked about submitting fake invoices referred to those Exhibits.

The government mischaracterizes Kushiyama's cross examination. Opp. Br. 7. Most of the questions preceding the question regarding Kushiyama's intent refer to the appraisal he gave for HIE's equipment and whether he used other forms to provide appraisals of equipment. 3 RT 57-58. Kushiyama responded that he used the same types of invoices as in this case and by using these invoices, it did not mean that he was selling equipment to someone. 3 RT 59. The district court sustained the government's objection when Kushiyama was asked if he had ever been asked to do appraisals for anyone else other than HIE. When he was then asked "[a]s far as these invoices," if he intended "to submit fake invoices to anyone," the district court sustained the government's objection. 3RT 59. The questions immediately following asked Kushiyama about the financing between HIE and GECC and whether anyone called from GECC regarding

"these invoices." 3 RT 59-60.[8/]

The government claims that petitioner's argument that the question at issue was relevant even if it was interpreted by the district court as referring to invoices prepared for third parties, was not presented to the district court or the court of appeals and this Court should not pass on this claim in the first instance. Opp. Br. 8. The argument, however, could not have been presented to the district court during trial because no explanation was given for the ruling. Once the Ninth Circuit issued its opinion and stated that it was not completely clear whether "these invoices," referred to those prepared for Boulware or to ones prepared for other customers, the relevancy of invoices prepared for other parties was addressed by petitioner in his petition for panel rehearing.

The Ninth Circuit observed that the district court was under the "impression" that "these invoices" referred to invoices for other parties and defense counsel did nothing to disabuse him of this impression. Pet. App. A32. Therefore, the Ninth Circuit reasoned that the limitation on the cross examination of Kushiyama was not so severe as to amount to a violation of petitioner's Confrontation Clause rights. *Ibid.* But there was no specific finding by the Ninth Circuit with respect to the precise meaning of the question put to Kushiyama regarding any fraudulent intent on his part in preparing the invoices.

After the Ninth Circuit offered some explanation for the district court's ruling, petitioner immediately pointed out the relevancy of the question and its propriety with respect to

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[8/] Petitioner in his Petition for Certiorari incorrectly stated Kushiyama never spoke to representatives of GECC. Pet. 26. In fact, Kushiyama testified he was called by GECC when an error in value was detected on these invoices. 3 RT 60

third parties as a proper subject of cross examination in his petition for rehearing. Hence, the relevancy of the question with respect to third parties and the district court's limitation of cross examination regarding Kushiyama's fraudulent intent in preparing the invoices for other parties is properly before this Court.[9/]

Whether Kushiyama used the forms labeled "invoice" to submit "fake" appraisals or "invoices" for other individuals was highly relevant. If he intentionally submitted fake documents for others, this would support the inference he intended to do so with the invoices admitted into evidence. However, if he never submitted "fake" invoices or appraisals for others, this was circumstantial evidence that he did not intend to do so here. Clearly, petitioner was entitled to cross-examine Kushiyama on this subject. *Davis v. Alaska*, 415 U.S. 308, 318 (1974); *cf. Crawford v. Washington*, 541 U.S. 36, 61[10/] (2004). The failure to allow this cross-examination, whether or not the district court correctly understood the question, denied petitioner his Sixth Amendment right to cross examine Kushiyama because, under either interpretation

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[9/] While Kushiyama's intent with respect to third parties was impliedly addressed when the petition for panel rehearing was denied, this Court may, in any event, consider petitioner's Confrontation Clause claim in the first instance as an exceptional case coming from the federal courts. *United States v. Mendenhall,* 446 U.S. 544, 551-552, n.5 (1980); *Carlson v. Green,* 446 U.S. 14, 17, n.2 (1980); *Youakim v. Miller*, 425 U.S. 231, 234 (1976) (*per curium*); *Duignan v. United States*, 274 U.S. 195, 200 (1927).

[10/] "To be sure, the Clause's ultimate goal is to ensure reliability of evidence, but it is a procedural rather than a substantive guarantee. It commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination. The Clause thus reflects a judgment, not only about the desirability of reliable evidence (a point on which there could be little dissent), but about how reliability can best be determined."

of the question, the cross examination was highly relevant and critical to the charge and petitioner's defense.

This is particularly true here where Kushiyama was never asked by the prosecutor if he intended to defraud GECC or if he agreed with Boulware to attempt to defraud GECC. Thus, the jury could only rely on speculation to conclude that he had conspired with Boulware. Petitioner was entitled by the Confrontation Clause to expose this "speculation" as the prosecution's wishful thinking. 1 RT 108. The prohibited questioning would have revealed that Kushiyama had no intent to defraud anyone with the trial Exhibits, thereby requiring petitioner's acquittal on the conspiracy.

When the prejudicial spill over from the district court's failure to give binding effect to the state court judgment and the unconstitutional restriction on cross-examination are considered cumulatively, *Kyles v. Whitely*, 514 U.S. 419, 421-422 (1995), it is clear that the conviction on Count 10 must be reversed. When the conviction for Count 10 is reversed, this requires the forfeiture in Count 15 to be vacated, because there is no longer a predicate conviction for the forfeiture.

3. Count 15 sought forfeiture of $495,814.80, the amount of money involved in the allegations regarding GECC, even though that sum, with interest, had been repaid by HIE, and HIE repaid by petitioner prior to June 1993. The government argues that the Ninth Circuit did not address the issue whether the forfeiture order violated the Eighth Amendment and the Ninth Circuit's decision does not present a conflict warranting this Court's review. Opp. Br. 8-9. Although the violation of the Eight Amendment's excessive fines clause was not addressed by the Ninth Circuit, this Court may consider petitioner's Eighth Amendment claim in the first instance as an exceptional case coming from the federal courts. *Capitol Cities Cable, Inc. v. Krisp*, 467 U.S. 691, 697 (1984);

Youakim v. Miller, supra, 425 U.S. at 234.

Petitioner contends that the forfeiture of almost $500,000.00 is totally disproportional to the offense, given that there was no actual loss and therefore no harm to the victim, the amount financed was completely collateralized, and the funds advanced have already been repaid to the alleged victim of the fraud who will not receive the forfeited funds from the government as there is nothing to repay. *Cf. United States v. 3814 NW Thurman Street*, 164 F.3d 1191 (9th Cir. 1999) (forfeiture of funds where no actual loss was excessive fine); *United States v. Hawkey*, 148 F.3d 920, 928 (8th Cir. 1998)(funds subject to forfeiture must reflect funds returned prior to forfeiture order). The additional punishment of almost $500,000.00 under these circumstances is unduly harsh and excessive in violation of the Eighth Amendment.

CONCLUSION

Certiorari should be granted to resolve these important questions regarding federal income tax, federalism, comity, a criminal defendant's rights to due process, a fair trial and his right to present a defense and to cross examine witnesses, under the Fifth and Sixth Amendments to the Constitution, and the prohibition against excessive fines under the Eighth Amendment to the Constitution.

Dated: September 13, 2005

Respectfully submitted,

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